

## IDEOLOGICAL RESPONSES TO THE CORONAVIRUS PANDEMIC: CHINA AND ITS OTHER

Samuli Seppänen<sup>†</sup>

### *Abstract*

This Article discusses the ongoing coronavirus pandemic as an instance of ideological contestation between the People's Republic of China and its ideological Other—the “Western” liberal democracies. Much of this ideological contestation highlights the idiosyncratic aspects of opposing ideological narratives. From the illiberal perspective, promoters of liberal narratives on governance and public health can be said to focus too much on procedural legitimacy and, consequently, appear to be ill-placed to acknowledge and respond to public health emergencies. Conversely, from the liberal perspective, advocates of illiberal narratives appear to be responding to a never-ending emergency and, consequently, seem unable to take full advantage of procedural legitimacy and rule-based governance in order to prevent public health emergencies from occurring. The coronavirus pandemic also exposes the aspirational qualities of both ideological narratives. On one hand, it appears aspirational to assume that the coronavirus response in liberal democratic countries can be based on the respect for individual freedom, human dignity, and other liberal first principles. On the other hand, the image of a strong, stable government projected by the CCP also seems to be based on aspirational notions about the coherence and resilience of the P.R.C.'s governance project. In the middle of the pandemic, it appears that the coronavirus follows no ideological script.

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<sup>†</sup> Associate Professor, The Chinese University of Hong Kong, Faculty of Law.

<i>Abstract</i> .....	24
I. INTRODUCTION.....	25
II. LIBERAL NARRATIVES ON PUBLIC HEALTH: THE CONVENTIONAL APPROACH.....	33
III. LIBERAL NARRATIVES ON PUBLIC HEALTH: THE HUMAN RIGHTS-BASED APPROACH.....	37
IV. QUESTIONING LIBERAL NARRATIVES.....	43
V. ILLIBERAL EXCEPTIONALISM .....	47
VI. IDEOLOGICAL UNMASKING .....	56
VII. CONCLUSION.....	65

## I. INTRODUCTION

Does illiberal political thought provide a more effective means for managing public health emergencies, such as the ongoing COVID-19 (“coronavirus”) pandemic, than a self-consciously liberal approach to public health? Answers to this question relate to a central point of contestation in contemporary political thought: Namely, whether an illiberal government, which defines itself by its willingness to restrict and suspend individual rights, is more effective in tackling political emergencies and economic and developmental challenges than a liberal government.<sup>1</sup>

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<sup>1</sup> For recent discussion on the respective merits of liberalism and different forms of illiberalism (mainly authoritarianism) in the coronavirus pandemic, see, for example, Florian Bieber, *Authoritarianism in the Time of the Coronavirus*, FOREIGN POL’Y (Mar. 30, 2020), <https://foreignpolicy.com/2020/03/30/authoritarianism-coronavirus-lockdown-pandemic-populism> [<https://perma.cc/WB6P-G8VL>] (discussing how COVID-19, like other pandemics, is subject to abuse under both authoritarian and democratic regimes); Francis Fukuyama, *The Pandemic and Political Order: It Takes a State*, FOREIGN AFF. (July/Aug. 2020), <https://www.foreignaffairs.com/articles/world/2020-06-09/pandemic-and-political-order> [<https://perma.cc/4LU8-ZJSB>] (arguing that the particular regime type may not matter when responding to crises, and explaining the effectiveness of a government’s coronavirus response on the basis of factors such as a “competent state apparatus, a government that citizens trust . . . and effective leaders”); Matthew M. Kavanagh, *Authoritarianism, Outbreaks, and Information Politics*, 5 LANCET PUB. HEALTH (Mar. 2020), <https://www.thelancet.com/action/showPdf?pii=S2468-2667%2820%2930030-X> [<https://perma.cc/TET2-S2FP>] (suggesting that China’s authoritarian regime may

As of August 2020, it is too early to draw conclusions about the efficiency of liberal and illiberal responses to the coronavirus pandemic. In fact, the time may never be ripe for drawing final conclusions about the pandemic, as ideological narratives allow their promoters to justify even the most inconvenient facts. Be that as it may, even in the middle of the pandemic, it is still possible to examine the challenges against various ideological narratives on public health emergencies. It seems particularly fruitful to view such challenges in the context of the ideological contestation—and “Othering”—between the People’s Republic of China (“the P.R.C.”) and “Western” liberal democracies.<sup>2</sup>

Much of North American and European commentary on the Chinese government’s coronavirus response uses what could be considered liberal narratives on public health. At play in this commentary are two distinct approaches to the relationship between human rights and public health. The first, more conventional approach views human rights as checks and balances for public health measures, suggesting that there is a trade-off between human rights and public health. The government may restrict specific rights, such as the freedom of movement, in public health emergencies, but these restrictions must be necessary, proportional, and non-discriminatory.<sup>3</sup>

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have prevented a timely response to the coronavirus outbreak); Minxin Pei, *China’s Coming Upheaval: Competition, the Coronavirus, and the Weakness of Xi Jinping*, FOREIGN AFF. (Apr. 3, 2020), <https://www.foreignaffairs.com/articles/united-states/2020-04-03/chinas-coming-upheaval> [<https://perma.cc/CH8W-R6VV>]; Zhao Yanjing (赵燕菁), *Jinkuai Jianli Zhongguo Kangyi de Hexin Xushi* (尽快建立中国抗疫的核心叙事) [*Establish a Core Narrative for China’s Fight Against the Epidemic As Soon As Possible*], AI SIXIANG (April 10, 2020), <http://www.aisixiang.com/data/120808.html> [<https://perma.cc/WU7X-TNFM>] (discussing China’s rebuttal to the Western critiques of China’s initial handling of the coronavirus pandemic).

<sup>2</sup> For China and “the Orient” as the Other of Europeans, see Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179, 197 (2002) (discussing how the West differentiates itself from China); Teemu Ruskola, *Where Is Asia? When Is Asia? Theorizing Comparative Law and International Law*, 44 U.C. DAVIS L. REV. 879, 882 (2011) (describing the Orient as Europe’s first Other). Conversely, Western liberal democracies act as the Other in the Chinese ideological discourse. See *infra* text accompanying notes 104–106.

<sup>3</sup> According to the Siracusa Principles, restrictions on rights must be, *inter alia*, provided for by the law, applied in a non-arbitrary and non-discriminatory manner, pursue a legitimate aim, be proportional to their aims, and constitute the least restrictive means available. ECOSOC, *Siracusa Principles on the Limitation*

The second, more recently developed human rights-based approach to health contends that the trade-off between human rights and public health is unnecessary. Instead, this approach suggests that the implementation of human rights obligations (e.g., freedom of expression and the right to information) correlates positively with the attainment of public health objectives.<sup>4</sup> The former approach facilitates normative assessments of public health measures, whereas the latter approach provides an empirical and normative argument about the mutually reinforcing linkages between health and human rights.

The human rights-based approach is particularly important for understanding the ideological contestation regarding the coronavirus pandemic. This approach suggests that the illiberal nature of China's governance model (including the lack of rights protections in the P.R.C.) was a catalyst for the coronavirus pandemic.<sup>5</sup> The outline of this narrative is presently as follows: local authorities in Wuhan, accustomed to repressing inconvenient truths and appeasing their superiors, silenced early warnings about the virus, allowing it to spread unnoticed.<sup>6</sup> Once the authorities had no choice but to acknowledge the outbreak, their excessively coercive measures drove the pandemic underground, making it more difficult to identify,

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*and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, annex (1985) [hereinafter *Siracusa Principles*].

<sup>4</sup> See LAWRENCE O. GOSTIN & ZITA LAZZARINI, HUMAN RIGHTS AND PUBLIC HEALTH IN THE AIDS PANDEMIC 19 (1997) (stating that “[f]reedom of expression is critical in medicine and health care”); see also Daniel Tarantola et al., *Human Rights, Health and Development*, 13 AUSTL. J. HUM. RTS 1, 4 (2008) (discussing public health and rights relating to information).

<sup>5</sup> Salvatore Babones, *The ‘Chinese Virus’ Spread Along the New Silk Road*, FOREIGN POL’Y (Apr. 6, 2020), <https://foreignpolicy.com/2020/04/06/chinese-coronavirus-spread-worldwide-on-new-silk-road/> [<https://perma.cc/9AQA-6XPD>]; Kavanagh, *supra* note 1; Pei, *supra* note 1. Chinese scholars are aware of this narrative and the strategic need to respond to it. See Zhao, *supra* note 1.

<sup>6</sup> Jane Cai, *Lack of Free Speech Helped Spread of Coronavirus in China, Says Leading Professor*, S. CHINA MORNING POST (Feb. 18, 2020), <https://www.scmp.com/news/china/society/article/3051219/china-paying-heavy-price-coronavirus-because-lack-free-speech> [<https://perma.cc/2QCS-5ANT>]; Edward Wong, Julian E. Barnes & Zolan Kanno-Youngs, *Local Officials in China Hid Coronavirus Dangers from Beijing, U.S. Agencies Find*, N.Y. TIMES (Aug. 19, 2020), <https://www.nytimes.com/2020/08/19/world/asia/china-coronavirus-beijing-trump.html> [<https://perma.cc/8YKR-ZV84>].

isolate, and treat infected people.<sup>7</sup> Up to five million people left Wuhan, the epicenter of the outbreak, in anticipation of strict quarantine measures, helping the virus to spread domestically and internationally.<sup>8</sup> These people and other citizens from Hubei, the province in which Wuhan is located, faced discrimination elsewhere in China, deterring them from seeking medical attention and further worsening the outbreak.<sup>9</sup> From this perspective, the coronavirus pandemic was a consequence of the pathologies of illiberalism.

Illiberal political thought also views public health through its internal ideological prism. In the imagination of nineteenth and twentieth century theorists of, and for, dictatorial governments, the inability of liberal governments to respond to political emergencies demonstrated the need for strong, law-transcending political leadership.<sup>10</sup> In a similar vein, Chinese commentary on the coronavirus has highlighted the unique strengths of China's authoritarian government and the Chinese Communist Party (CCP).<sup>11</sup> The Chinese government's white paper on the coronavirus response

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<sup>7</sup> Josephine Ma & Zhuang Pinghui, *5 Million Left Wuhan Before Lockdown, 1,000 New Coronavirus Cases Expected in City*, S. CHINA MORNING POST (Jan. 26, 2020), <https://www.scmp.com/print/news/china/society/article/3047720/chinese-premier-li-keqiang-head-coronavirus-crisis-team-outbreak> [<https://perma.cc/8B5U-XGB6>]. The WHO's report on China's coronavirus also notes that five million people left Wuhan during the outbreak. *See Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)*, WORLD HEALTH ORGANIZATION [WHO] (Feb. 28, 2020), [https://www.who.int/publications-detail/report-of-the-who-china-joint-mission-on-coronavirus-disease-2019-\(covid-19\)](https://www.who.int/publications-detail/report-of-the-who-china-joint-mission-on-coronavirus-disease-2019-(covid-19)) [<https://perma.cc/XXU7-T7MX>].

<sup>8</sup> *Id.*

<sup>9</sup> Phoebe Zhang, *Stranded, Quarantined, Doxxed: How Coronavirus Made Pariahs of Those Who Left Wuhan*, S. CHINA MORNING POST (Feb. 4, 2020), <https://www.scmp.com/news/china/society/article/3048781/stranded-quarantined-doxxed-how-coronavirus-made-pariahs-those> [<https://perma.cc/9HTY-XYFP>].

<sup>10</sup> DONOSO CORTÉS, *ESSAYS ON CATHOLICISM, LIBERALISM AND SOCIALISM, CONSIDERED IN THEIR FUNDAMENTAL PRINCIPLES* 174–175 (William M'Donald trans., 1879); CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 69–70 (George Schwab trans., 2007) (1932).

<sup>11</sup> *See, e.g.,* Mo Jihong (莫纪宏), *Kangyi Douzheng shi Zhidu Youshi Zuizhijie de Zhengming* (抗疫斗争是制度优势最直接的证明) [*The Fight Against the Epidemic is the Most Direct Proof of the Advantages of the System*], AI SIXIANG (May 21, 2020), <http://www.aisixiang.com/data/121579.html> [<https://perma.cc/5FXX-SD9U>] (commending the advantages of China's governance system in light of its coronavirus response).

explicitly frames its successes as a consequence of CCP leadership.<sup>12</sup> China's state-run media has described the Chinese government's response to the pandemic as a "highly organized" war-like mobilization of national resources.<sup>13</sup> Conservative voices in Chinese media have contrasted this undertaking with "Western...values of liberalism," which prevented Western countries from adopting efficient public health measures in order to contain the pandemic in time.<sup>14</sup>

Such critique notwithstanding, it would be a mistake to argue that the Chinese approach to the coronavirus pandemic amounts to a negation of rights and legal processes. Appeals to legality have played a role in the Chinese government's effort to contain the pandemic. President Xi Jinping himself has called for the "strict enforcement of law on prevention and control of infectious diseases."<sup>15</sup> Such statements demonstrate that CCP leadership seeks to take advantage of legal processes, even if the justifications for doing so are not the same as in the liberal narratives on governance.<sup>16</sup> Adding another layer of nuance to the Chinese government's approach, the Chinese Supreme People's Court's has given much play to pragmatic aspects of Chinese legal thought in its coronavirus response. Among other things, the Supreme People's Court promotes the settlement of legal disputes so that businesses affected by the

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<sup>12</sup> P.R.C. STATE COUNCIL, FIGHTING COVID-19: CHINA IN ACTION (June 2020), [http://english.scio.gov.cn/whitepapers/2020-06/07/content\\_76135269.htm](http://english.scio.gov.cn/whitepapers/2020-06/07/content_76135269.htm) [<https://perma.cc/3QC5-L3NV>]. For a Chinese scholar outlining this argument as a response to the liberal narrative on the pandemic, see Zhao, *supra* note 1.

<sup>13</sup> *Fighting Coronavirus is a People's War*, GLOB. TIMES (Feb. 5, 2020), <https://www.globaltimes.cn/content/1178655.shtml> [<https://perma.cc/79SN-UUAL>].

<sup>14</sup> *Community Grid System Helps China Fight Virus*, GLOB. TIMES (Feb. 5, 2020), <https://www.globaltimes.cn/content/1178528.shtml> [<https://perma.cc/AL2X-RJKS>]. For a discussion on similar views in the Chinese blogosphere, see Jordan Schneider, *Chinese Commentary: "COVID-19 May Ravage America, But It Won't Dent American Self-Confidence"*, CHINATALK (Apr. 8, 2020), <https://chinatalk.substack.com/p/chinese-commentary-covid-19-may-ravage> [<https://perma.cc/B6UX-9RYJ>].

<sup>15</sup> *Xi Stresses Law-based Infection Prevention, Control*, XINHUA (Feb. 5, 2020), [http://www.xinhuanet.com/english/2020-02/05/c\\_138758520.htm](http://www.xinhuanet.com/english/2020-02/05/c_138758520.htm) [<https://perma.cc/669H-82GD>].

<sup>16</sup> See generally, Taisu Zhang & Tom Ginsburg, *China's Turn Toward Law*, 59 VA. J. INT'L L. 307 (2019) (discussing China's turn towards legality).

pandemic will not go under due to short-term liquidity problems.<sup>17</sup> In line with similar restrictions adopted through legislation in other countries, this approach places limits on the enforcement of rights of creditors and landlords during the pandemic.<sup>18</sup>

Extra-legal measures also remain a governance tool for the Party. The CCP leadership describes its governance methods in terms of direct action, which is capable of cutting through “formalism” and “bureaucratism.”<sup>19</sup> As a reflection of the Party leadership’s ambiguous commitment to legality in the present pandemic, some of the most extreme public health measures taken by some local Chinese governments allegedly have no basis in Chinese law.<sup>20</sup> Finally, it is

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<sup>17</sup> See *Zuigao Renmin Fayuan Yanjiushi Fuze Ren jiu Chutai Yifa Tuoshan Shenli she Xinguan Feiyan Yiqing Minshi Anjian Ruogan Wenti de Zhidao Yijian (Yi): Da Jizhe Wen* (最高人民法院研究室负责人就出台依法妥善审理涉新冠肺炎疫情民事案件若干问题的指导意见(一):答记者问) [*Supreme People’s Court Research Office Issues Guidance on the New Coronavirus Epidemic—Answering Reporters’ Questions*], SUP. PEOPLE’S CT., (Apr. 20, 2020), <http://www.court.gov.cn/zixun-xiangqing-226251.html> [<https://perma.cc/RZ5C-9L5G>] (discussing the SPC’s guidance on the coronavirus pandemic).

<sup>18</sup> For legislation in other countries, see, for example, Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020), <https://www.congress.gov/bill/116th-congress/house-bill/748> [<https://perma.cc/Y9P9-43W9>] (providing bankruptcy relief for small business debtors and imposing a temporary moratorium on eviction filings); Coronavirus Act 2020, c. 7, § 81, sch. 29 (Gr. Brit.), <https://www.legislation.gov.uk/ukpga/2020/7/schedule/29> [<https://perma.cc/ZL4H-4R2W>] (adopting measures to protect residential tenants from evictions in England and Wales).

<sup>19</sup> See generally Wang Zihui (王子晖), *Liang Ci Zhongyao Huiyi, Xi Jinping Zhesange Yaoqiu Yiyiguanzhi* (两次重要会议, 习近平这三个要求一以贯之) [*Two Important Meetings, Xi Jinping’s Three Consistent Requirements*], XINHUA (Feb. 4, 2020), [http://www.xinhuanet.com/politics/xxjxs/2020-02/04/c\\_1125530611.htm](http://www.xinhuanet.com/politics/xxjxs/2020-02/04/c_1125530611.htm) [<https://perma.cc/RX63-SZDU>] (reporting on General Secretary Xi Jinping’s “stark warning” to the supporters of formalism and bureaucratism). In Party ideology, formalism and bureaucratism are distinct from legality. See text accompanying *infra* notes 165-169.

<sup>20</sup> See Shen Kui (沈崧), *Dayi Zhixia Shandai Mei yige Ren de Jiben Quanli* (大疫之下善待每一个人的基本权利) [*Respect Each Person’s Basic Rights Under a Great Epidemic*], WECHAT PKUPUBLICLAW (Feb. 17, 2020), <https://mp.weixin.qq.com/s/FSqrVCo9SkEEfG1apkeE6A> [<https://perma.cc/587Y-XBG5>] (arguing that some measures taken by the Chinese local governments potentially infringe upon people’s constitutional rights, such as the right of personal dignity, the right to adequate housing, and the right to privacy); Tong

noteworthy that the CCP's extra-legal discipline inspection organs have set out to strengthen the ideological controls of Party cadres and state officials whose responsibility it is to respond to the crisis.<sup>21</sup> Adherence to formal legality is probably not a high priority in this effort.<sup>22</sup>

The ideological narratives described in this Article provide a convenient structure for legitimizing and criticizing government responses to the coronavirus pandemic. In these narratives China and liberal democracies appear as points of contrast through which the promoters of the narratives describe themselves. Much of this ideological Othering highlights the idiosyncratic aspects and endemic weaknesses of the opposing ideological outlook. From the illiberal perspective promoters of liberal narratives on governance and public health can be said to focus too much on procedural legitimacy; and consequently, they appear to be ill-placed to acknowledge and respond to public health emergencies. Conversely, from the liberal perspective advocates of illiberal narratives on governance and public health appear to be responding to a never-ending emergency situation; consequently, they are unable to take full advantage of procedural

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Zhiwei (童之伟), *Zai Fazhi Guidao Shang Huajie Gonggong Weisheng Weiji* (在法治轨道上化解公共卫生危机) [*Resolve the Public Health Crisis on the Tracks of the Rule of Law*], AISIXIANG (Mar. 2, 2020), <http://www.aisixiang.com/data/120415.html> [<https://perma.cc/Z2WS-V35R>] (noting that some extreme measures taken by the Chinese local governments lack a legal basis and interfere with people's legal rights).

<sup>21</sup> See Zhongyang Jiwei Guojia Jianwei Dui Guanche Dang Zhongyang Bushu Yaoqiu, *Zuo Hao Xinxing Guanzhuang Bingdu Ganran Feiyan Yiqing Fangkong Jiandu Gongzuo Fachu Tongzhi* (中央纪委国家监委对贯彻党中央部署要求、做好新型冠状病毒感染肺炎疫情防控监督工作发出通知) [*Central Commission for Discipline Inspection and National Supervision Commission Issues a Notice on Implementing the Requirements of the CCP Central Committee on the Prevention and Control of the Novel Coronavirus Pneumonia*], CENT. COMM'N FOR DISCIPLINE INSPECTION (Jan. 30, 2020), [http://www.ccdi.gov.cn/toutiao/202001/t20200130\\_210462.html](http://www.ccdi.gov.cn/toutiao/202001/t20200130_210462.html) [<https://perma.cc/6543-67FP>] [hereinafter *CCDI*] (describing the CCDI's disciplinary requirements during the pandemic).

<sup>22</sup> See generally Jacques Delisle, *The Rule of Law with Xi-Era Characteristics: Law for Economic Reform, Anticorruption, and Illiberal Politics*, 20 ASIA POL'Y 23 (2015) (discussing the thin conception of legality and the rule of law). See also BRIAN TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 92–93 (2004) (explaining how rule by law essentially collapses into rule by the government).



legitimacy and rule-based governance in order to prevent public health emergencies from occurring. These ideological narratives may not be the only way, or even the principal way, for conceptualizing governance responses to the pandemic, but neither are they without any social effects. Among other things, the narratives explain why an individual sacrifice in the face of a public health emergency is just. This may be because the individual is presumed to have consented to the laws on which coercive measures are based, or it may be because the governing political movement—in China, the CCP—is presumed to represent everybody’s interests, including the interests of those people who are subject to coercive measures.<sup>23</sup>

Adopting an external perspective to both liberal and illiberal ideological narratives, this Article argues that the coronavirus pandemic exposes aspirational qualities of both these narratives. On one hand, the similarity between the coercive methods adopted in liberal and illiberal political regimes makes the liberal justification for public health measures seem aspirational, or outright fictitious. While various rights claims can be relevant for decision-making about public health measures,<sup>24</sup> seeking to generate a coherent policy response on the basis of liberal first principles, such as individual freedom and autonomy, seems aspirational at best. In particular, it is by no means clear that the human rights-based approach provides a coherent policy framework for the coronavirus response.<sup>25</sup> On the other hand, the image of a strong, stable government projected by the CCP also seems aspirational in light of the pandemic.<sup>26</sup> The precarious nature of the Party’s governance project is highlighted by the Party leaders’ ambivalent approach to formal rights and legal processes. Formal rights and legal processes would allow inconvenient but important information to circulate freely, but such rights and processes could also open the floodgates for politically subversive speech, which could destabilize the regime.<sup>27</sup>

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<sup>23</sup> See *infra* text accompanying notes 106, 288–29.

<sup>24</sup> Samuli Seppänen, *From Substance to Absence: Argumentative Strategies in the Implementation of the Human Rights-Based Approaches to Development*, 49 N.Y.U. J. INT’L L. & POL. 389, 440 (2017).

<sup>25</sup> See *infra* text accompanying notes 96–98.

<sup>26</sup> For this projection, see P.R.C. STATE COUNCIL, *supra* note 12 (referring to “the strong leadership of the [CCP] Central Committee”).

<sup>27</sup> See *infra* text accompanying notes 127–128, 171 (discussing the CCP’s conflicting ideologies towards the rule of law).

The remaining parts of this Article are organized as follows. Part II describes the conventional approach to the relationship between health and human rights. Part III focuses on the human rights-based approach to health. Part IV examines intellectual criticisms against the liberal narratives on public health. Part V describes illiberal narratives on public health through China's response to the coronavirus outbreak. Part VI brings the liberal and illiberal narratives together and examines their aspirational qualities and endemic weaknesses. Part VII concludes.

## II. LIBERAL NARRATIVES ON PUBLIC HEALTH: THE CONVENTIONAL APPROACH

At the highest level of abstraction, liberal narratives justify public health policies through principles such as individual freedom and respect for human agency, autonomy, and dignity.<sup>28</sup> The provision of available and accessible healthcare services, for instance, must allow people to live “a life in dignity.”<sup>29</sup> Restrictive public health measures, such as the isolation of infected patients and the quarantining of potentially infected people, must facilitate maximum space for individual freedom and respect personal dignity.<sup>30</sup> Such measures can be said to be necessary only so far as they protect the freedom and human agency of others, and they are legitimate if and when they are based on democratically agreed laws.<sup>31</sup>

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<sup>28</sup> See JOHN RAWLS, A THEORY OF JUSTICE 53, 513 (1999) (describing the first principle of his theory of justice as the equal right of each person to the most extensive scheme of basic liberties compatible with similar schemes for others, and arguing that equal respect for people manifests in treating them justly); Mark Tushnet, *The Possibility of Illiberal Constitutionalism?*, 69 FLA. L. REV. 1367, 1368–69 (2017) (defining liberal constitutionalism through the principles of “the equality of all citizens” and “the priority of the right over the good”); Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 PHIL. Q. 127, 128 (1987) (defining liberalism as a “commit[ment] to a conception of freedom and of respect for the capacities and the agency of individual men and women”).

<sup>29</sup> See U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights [CESCR], Gen. Comment No. 14: The Right to the Highest Attainable Standard of Physical and Mental Health (Art. 12), ¶ 42, U.N. Doc. E/C.12/2000/4, ¶ 1 (Aug. 11, 2000) (stating that “[e]very human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity”).

<sup>30</sup> Shen, *supra* note 20.

<sup>31</sup> Waldron, *supra* note 28, at 133; SIRACUSA PRINCIPLES, *supra* note 3, ¶ 34.

The relationship between rights and public health can be conceived in different ways within this general conceptual framework. As mentioned in the Introduction, public health objectives have been conventionally thought to exist in a potential conflict with human rights.<sup>32</sup> The conventional approach is enshrined, for instance, in the Siracusa Principles, which pit human rights against public health objectives.<sup>33</sup> According to the Siracusa Principles, “[p]ublic health may be invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to . . . health . . . .”<sup>34</sup> Restrictions on rights must be provided for by the law, and they must be applied in a non-arbitrary and non-discriminatory manner.<sup>35</sup> They must also be necessary, pursue a legitimate aim, be proportional to their aim, and constitute the least restrictive means available.<sup>36</sup> Some rights and principles, such as the principle of non-discrimination, the right to life and the freedom from torture, are non-derogable.<sup>37</sup> The Siracusa Principles also call for “[a]dequate safeguards and effective remedies . . . against illegal or abusive imposition or application of limitations on human rights.”<sup>38</sup> A similar approach to conceptualizing the relationship between health and human rights is apparent in the 2005 International Health Regulations (IHR), which govern international processes for preventing the spread of communicable diseases, such as the coronavirus.<sup>39</sup> In addition to including a general statement about the “respect for the dignity, human rights and fundamental freedoms of persons” in the implementation of the regulations, the IHR provides that states “shall treat travelers with respect for their dignity, human

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<sup>32</sup> At the same time, the conventional approach does not recognize a trade-off between individual freedom and dignity and public health. It allows rights restrictions “solely for the purpose of securing due recognition and respect for the rights and freedoms of others . . . in a democratic society.” G.A. Res. 217 A (III), The Universal Declaration of Human Rights, art. 29(2) (Dec. 10, 1948).

<sup>33</sup> See generally SIRACUSA PRINCIPLES, *supra* note 3.

<sup>34</sup> SIRACUSA PRINCIPLES, *supra* note 3, ¶ 25.

<sup>35</sup> *Id.* ¶¶ 5, 7, 9.

<sup>36</sup> *Id.* ¶¶ 10, 11.

<sup>37</sup> *Id.* ¶¶ 9, 58.

<sup>38</sup> *Id.* ¶ 18.

<sup>39</sup> WORLD HEALTH ORGANIZATION [WHO], INTERNATIONAL HEALTH REGULATIONS (2nd ed. 2005), [https://apps.who.int/iris/bitstream/handle/10665/43883/9789241580410\\_eng.pdf?sequence=1](https://apps.who.int/iris/bitstream/handle/10665/43883/9789241580410_eng.pdf?sequence=1) [https://perma.cc/4WJ4-RQCR].

rights and fundamental freedoms and minimize any discomfort or distress associated with such measures . . . .”<sup>40</sup>

This vocabulary allows one to make normative assessments about public health measures adopted in the present coronavirus pandemic. The cordoning off of entire cities,<sup>41</sup> the monitoring of people’s movement through mandatory mobile phone applications,<sup>42</sup> and the isolation of infected patients in clinics with access to adequate healthcare services can be said to satisfy the Siracusa Principles—or not, depending on how one weights the scales of justice. Some government measures may fall short of the test set out in Siracusa Principles because less restrictive and more efficient public health measures would have been available for the authorities.<sup>43</sup> For instance, the policy in China’s Zhejiang province to allow only one person from a household to leave their home every two days would be compared unfavorably to equally effective, but more lenient measures adopted elsewhere in the world.<sup>44</sup> Other government measures may fail the Siracusa Principles’ test because they do not yield positive health outcomes.<sup>45</sup> For example, the practice in Zhejiang province to prevent people who visited heavily affected

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<sup>40</sup> *Id.* at art. 3, 32.

<sup>41</sup> Zunyou Wu & Jennifer McGoogan, *Characteristics of and Important Lessons from the Coronavirus Disease 2019 (COVID-19) Outbreak in China: Summary of a Report of 72,314 Cases from the Chinese Center for Disease Control and Prevention*, 323(13) JAMA 1239–1242, (Feb. 24, 2020), doi:10.1001/jama.2020.2648.

<sup>42</sup> Minghe Hu, *Beijing Rolls Out Colour-coded QR System for Coronavirus Tracking Despite Concerns Over Privacy, Inaccurate Ratings*, S. CHINA MORNING POST (Mar. 2, 2020), <https://www.scmp.com/tech/apps-social/article/3064574/beijing-rolls-out-colour-coded-qr-system-coronavirus-tracking> [https://perma.cc/4X98-EHNQ].

<sup>43</sup> *Compare* Viola Zhou, *Coronavirus: Zhejiang Adopts Draconian Quarantine Measures to Fight Disease*, S. CHINA MORNING POST (Feb. 6, 2020), <https://www.scmp.com/news/china/society/article/3049298/coronavirus-zhejiang-adopts-draconian-quarantine-measures-fight> (describing local quarantine measures in China), *with* Richard Pérez-Peña, *Virus Hits Europe Harder than China. Is that the Price of an Open Society?*, N.Y. TIMES (Mar. 19, 2020), <https://www.nytimes.com/2020/03/19/world/europe/europe-china-coronavirus.html?referringSource=articleShare> [https://perma.cc/UH78-43TW] (explaining how Singapore and South Korea used “aggressive testing and contact-tracing to stop the chain of transmission, without shutting down economic activity”).

<sup>44</sup> *Id.*

<sup>45</sup> *See* Shen, *supra* note 20, for such a practice in the Zhejiang Province of China.

areas from returning to their homes led people to shelter with relatives or in hotels, potentially spreading the virus further.<sup>46</sup>

The concept of discrimination in the Siracusa Principles is partly tied to a determination about what counts as a successful public health intervention.<sup>47</sup> The forced evictions of specific groups of Chinese and foreign nationals, such as Nigerian people in Guangzhou, from their homes served no legitimate public health purpose and could, therefore, be seen as discriminatory under the Siracusa Principles.<sup>48</sup> Under the conventional approach, it is also possible to think of a situation where public health measures are considered discriminatory even if their effect on public health is neutral or positive. This would be the case with a provision of otherwise appropriate and necessary health services (say, a coronavirus vaccination program) in a discriminatory or stigmatizing manner.<sup>49</sup>

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<sup>46</sup> *Id.*

<sup>47</sup> See UNAIDS, RIGHTS IN THE TIME OF COVID-19: LESSONS FROM HIV FOR AN EFFECTIVE, COMMUNITY-LED RESPONSE 5 (2020), [https://www.unaids.org/sites/default/files/media\\_asset/human-rights-and-covid-19\\_en.pdf](https://www.unaids.org/sites/default/files/media_asset/human-rights-and-covid-19_en.pdf) [<https://perma.cc/X7UH-7QPJ>] (stating that a key lesson from the HIV pandemic is that the discrimination of different groups of people must be avoided in the design of effective public health measures); U.N. HUM. RTS. OFF. OF HIGH COMM’R, RACIAL DISCRIMINATION IN THE CONTEXT OF THE COVID-19 CRISIS 2 (2020), [https://www.ohchr.org/Documents/Issues/Racism/COVID-19\\_and\\_Racial\\_Discrimination.pdf](https://www.ohchr.org/Documents/Issues/Racism/COVID-19_and_Racial_Discrimination.pdf) [<https://perma.cc/JE9H-2WMY>] (emphasizing the need for the respect of human rights and the avoidance of discrimination); Delan Devakumar et al., *Racism and Discrimination in COVID-19 Responses*, 395 LANCET 1194 (2020), [https://doi.org/10.1016/S0140-6736\(20\)30792-3](https://doi.org/10.1016/S0140-6736(20)30792-3) [<http://perma.cc/292J-PD3B>] (explaining how a health system can only be strong if there is social inclusion).

<sup>48</sup> See *supra* text accompanying note 9 and Vivian Wang & Amy Qin, *As Coronavirus Fades in China, Nationalism and Xenophobia Flare*, N.Y. TIMES (Apr. 16, 2020), <https://www.nytimes.com/2020/04/16/world/asia/coronavirus-china-nationalism.html> [<https://perma.cc/A8HG-3DH3>] (describing how African residents of Guangzhou reported being evicted from their homes after only a few tested positive for coronavirus).

<sup>49</sup> See UNAIDS, *supra* note 47, at 8 (explaining that certain phrases and associations should be avoided when describing how the virus is transmitted); Wang & Qin, *supra* note 48 (discussing how China’s approach to controlling the virus has led to patriotism, nationalism, and xenophobia); *Addressing Human Rights as Key to the COVID-19 Response*, WORLD HEALTH ORGANIZATION [WHO] (Apr. 21, 2020), <https://apps.who.int/iris/bitstream/handle/10665/331811/WHO-2019-nCoV-SRH-Rights-2020.1-eng.pdf?sequence=1&isAllowed=y> [<http://perma.cc/Y2VT-V8U9>] (contending that public health emergencies often lead to discrimination against

The Siracusa Principles also require that “adequate safeguards and effective remedies” be in place against illegal and abusive rights restrictions.<sup>50</sup> Finally, public health measures that have no basis in law fall short of the Siracusa Principles. For instance, Chinese scholars have argued that city-wide lockdowns adopted in the beginning of the coronavirus pandemic violated Chinese laws.<sup>51</sup> Even the Chinese Supreme People’s Court chastised local authorities for adopting unlawful measures to suppress information about the outbreak.<sup>52</sup>

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certain groups or affected persons). *See also* U.N. HUM. RTS. OFF. OF HIGH COMM’R, *supra* note 47, at 3 (emphasizing that there is no place for any form of discrimination while responding to coronavirus).

<sup>50</sup> SIRACUSA PRINCIPLES, *supra* note 3, ¶ 18. For a discussion of the context of this question, see Elaine Yu et al., *Wuhan Rounds Up the Infected as Death Toll in China Jumps*, N.Y. TIMES (Feb. 6, 2020), <https://www.nytimes.com/2020/02/06/world/asia/coronavirus-china.html> [<https://perma.cc/MQ8X-5VJ7>].

<sup>51</sup> *See* Zhiqiong June Wang, *Law in Crisis: A Critical Analysis of the Role of Law in China’s Fight Against COVID-19*, GRIFFITH L. REV. 1, 10 (2020) (explaining how many post-lockdown measures taken without an emergency declaration in parts of China were legally problematic under Chinese law); Tong, *supra* note 20 (characterizing a local government’s order that residents must stay home or face being detained as illegal under Chinese law); Matthew Walsh, *China’s Super-Strict City Lockdowns May Be Illegal*, CAIXIN GLOB. (Feb. 18, 2020), <https://www.caixinglobal.com/2020-02-18/chinas-super-strict-city-lockdowns-may-be-illegal-101517249.html> [<https://perma.cc/SL4N-Q2CU>] (citing experts who say that the ban by authorities in Xiaogan on people leaving their homes may have been illegal). For a detailed analysis of P.R.C. law relating to the coronavirus pandemic (in German), see Philipp Renninger, *Corona und Kommunales Krisenmanagement in China—Städtisches Notfall-(Nicht-)Recht zur Bekämpfung von COVID-19 und Anderen Pandemien am Beispiel Wuhans*, DEUTSCHES VERWALTUNGSBLATT, 739, 745 (2020) (Ger.).

<sup>52</sup> Wang, *Law in Crisis*, *supra* note 51, at 12–15. For the Supreme People’s Court’s reaction to the reprimand issued to the coronavirus whistle-blower, Dr. Li Wenliang, see Tang Xinhua (唐兴华), *Zhili Youguan Xinxing Feiyan de Yaoyan Wenti, Zhe Pian Wenzhang Shuo Qingchu le!* (治理有关新型肺炎的谣言问题, 这篇文章说清楚了!) [*This Article Clarifies the Question of the Management of Rumours About the New Pneumonia!*], SUP. PEOPLE’S CT. WEIBO (Jan. 28, 2020), <https://www.weibo.com/ttarticle/p/show?id=2309404465698775629865> [<http://perma.cc/WGX9-Z9VX>] (urging local authorities to disclose necessary pandemic information to the public).

### III. LIBERAL NARRATIVES ON PUBLIC HEALTH: THE HUMAN RIGHTS-BASED APPROACH

The conventional approach to public health and human rights views human rights as a counterbalance and, in the case of non-derogable rights, as trumps to public health measures.<sup>53</sup> In doing so, the approach treats public health and human rights as two separate fields without emphasizing the causal relations between them. This view on health and human rights was rethought in the 1980s and 1990s, primarily due to another viral outbreak, the HIV/AIDS epidemic.<sup>54</sup> Rather than conceptualizing human rights and public health objectives in terms of a conflict and a trade-off, the new approach saw human rights and public health objectives in mutually re-enforcing terms.<sup>55</sup>

The change of perspective was partly motivated by the specific nature of the HIV/AIDS epidemic. Before effective treatment became available in the mid-1990s, individuals had few incentives to be tested for HIV.<sup>56</sup> Instead of receiving treatment, a person who tested positive for HIV could be evicted, expelled from

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<sup>53</sup> SIRACUSA PRINCIPLES, *supra* note 3, ¶¶ 58–60. Non-derogable rights include, *inter alia*, the right to life, freedom from torture, cruel, inhuman or degrading treatment or punishment, and freedom of thought, conscience and religion.

<sup>54</sup> See Jonathan M. Mann & Daniel Tarantola, *Responding to HIV/AIDS: A Historical Perspective*, 2(4) HEALTH & HUM. RTS. 5, 5–8 (1998) (describing how initial strategies implemented to combat the HIV/AIDS epidemic shifted to a human rights-based approach).

<sup>55</sup> *Id.* at 8.

<sup>56</sup> See, e.g., GOSTIN & LAZZARINI, *supra* note 4, at 43 (describing human rights violations against HIV-positive people early in the pandemic); Daniel Tarantola & Sofia Gruskin, *The Recognition and Evolution of the HIV and Human Rights Interface: 1981–2017*, in RSCH. HANDBOOK ON GLOB. HEALTH L. 303, 309–310 (Gian Luca Burci & Brigit Toebes eds. 2018) (mentioning that public health measures, including HIV prevention, in the 1990s could infringe on civil and political rights). The change of perspective in public health occurred at a time when the role of human rights was reconceptualized in development policies more generally. See generally HUMAN RIGHTS COUNCIL OF AUSTRALIA, THE RIGHTS WAY TO DEVELOPMENT: A HUMAN RIGHTS APPROACH TO DEVELOPMENT ASSISTANCE: POLICY AND PRACTICE (2001) (outlining new steps to apply a human rights-based approach to development); AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999) (commenting on changes in the discussion of human rights and development in the 1990s).

schools and fired from their jobs.<sup>57</sup> Consequently, many people chose to remain untested and thus unaware of their HIV-positive status, continuing risk behavior.<sup>58</sup> Under the new rights-based approach eliminating discrimination against HIV-positive people was understood “as central to the global AIDS challenge as the disease itself.”<sup>59</sup> Improving the rights of HIV-positive people (through, for instance, legal challenges to discrimination and the extensive application of disability legislation) reduced the social and economic costs of a positive HIV-test result for an individual, which further encouraged testing and ultimately decreased risk behavior.<sup>60</sup>

The new insight about the interrelatedness of health and human rights expanded from the field of HIV/AIDS to other fields of public health. According to the new human rights-based approach to health, human rights provided “public health with a coherent framework for analyzing and responding to the societal dimension of health.”<sup>61</sup> Promoters of the new approach argued, and continue to argue, that public health measures not only contribute to the attainment of social and economic rights, and most obviously to the right to health, but that they also improve the implementation of civil and political rights and the principle of non-discrimination.<sup>62</sup> All human rights—social, economic, and cultural, as well as civil and political—contribute to the aim of promoting individual freedom and respect for human agency.<sup>63</sup> At the same time, promoters of the rights-based approaches also presume that improving human rights

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<sup>57</sup> *Id.*

<sup>58</sup> See Mann & Tarantola, *supra* note 54, at 6–7 (mentioning that many HIV-positive people in vulnerable population groups could not access prevention services due to, in part, social discrimination).

<sup>59</sup> Jonathan M. Mann, *Statement at an Informal Briefing on AIDS to the 42nd Session of the United Nations General Assembly*, WORLD HEALTH ORGANIZATION [WHO] 1 (Oct. 20, 1987), [https://apps.who.int/iris/bitstream/handle/10665/61546/WHO\\_SPA\\_INF\\_87.12.pdf?sequence=1&isAllowed=y](https://apps.who.int/iris/bitstream/handle/10665/61546/WHO_SPA_INF_87.12.pdf?sequence=1&isAllowed=y) [<http://perma.cc/4L3W-FR27>].

<sup>60</sup> See George J. Annas, *The Impact of Health Policies on Human Rights: AIDS and TB Control*, in HEALTH & HUM. RTS.: A READER 37, 37–40, 43 (Jonathan Mann et al. eds., 1999) (detailing legal challenges to United States policy toward HIV-positive immigrants).

<sup>61</sup> S. Gruskin, J. Mann & D. Tarantola, *Past, Present, and Future: AIDS and Human Rights*, 2(4) HEALTH & HUM. RTS. 1, 2–3 (1998); Tarantola & Gruskin, *supra* note 56, at 313–314.

<sup>62</sup> CESCR, *supra* note 29, ¶ 3.

<sup>63</sup> SEN, *supra* note 56, at xi–xiii.



conditions contributes to the achievement of public health goals.<sup>64</sup> This is the case even with civil and political rights. The human rights-based approach to health teaches, for instance, that allowing civil society groups to operate freely enables them to advocate for various health-related rights and thus improve public health conditions.<sup>65</sup>

As is the case with other liberal narratives, in the human rights-based approach “the process is critical.”<sup>66</sup> Human rights need to be “integrated into every component of a project and every step of the process.”<sup>67</sup> The very meaning of health and other interrelated concepts, such as discrimination and human dignity, needs to be determined in a procedurally fair, human-rights-based process.<sup>68</sup> This is not only a normative argument about rights but also a consequentialist argument about health. Promoters of the rights-based approaches argue that in the long run, public health policies and programs formulated in a liberal democratic process are more responsive, legitimate and effective than policies and programs that are handed down by authoritarian governments.<sup>69</sup>

Arguments about the interrelatedness of health and human rights have appeared in much commentary on the ongoing coronavirus pandemic. As mentioned above, commentators in North America and Europe have suggested that the illiberal nature of China’s one-party state enabled and encouraged Chinese officials to suppress information about the outbreak in its early stages, thereby worsening the pandemic.<sup>70</sup> Some outspoken liberal-minded Chinese

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<sup>64</sup> WORLD HEALTH ORGANIZATION [WHO], 25 QUESTIONS & ANSWERS ON HEALTH AND HUMAN RIGHTS 20–21, (July 2002), <https://www.who.int/hhr/information/25%20Questions%20and%20Answers%20on%20Health%20and%20Human%20Rights.pdf> [<https://perma.cc/9TN2-ZFRN>].

<sup>65</sup> See *supra* note 4.

<sup>66</sup> See Sofia Gruskin, Dina Bogecho & Laura Ferguson, ‘Rights-based Approaches’ to Health Policies and Programs: Articulations, Ambiguities, and Assessment, 31 J. PUB. HEALTH POL’Y 129, 139 (2010).

<sup>67</sup> *Id.*

<sup>68</sup> See Alicia Ely Yamin, *Shades of Dignity: Exploring the Demands of Equality in Applying Human Rights Frameworks to Health*, 11 HEALTH AND HUM. RTS. 1, 13 (2009) (arguing that, without a fair method of implementation, human rights-based concepts would cease to be meaningful).

<sup>69</sup> See generally PAUL FARMER, PATHOLOGIES OF POWER: HEALTH, HUMAN RIGHTS, AND THE NEW WAR ON THE POOR (2004) (discussing international responses to public health crises).

<sup>70</sup> Kavanagh, *supra* note 1; Steven Lee Myers & Chris Buckley, *In Coronavirus, a ‘Battle’ That Could Humble China’s Strongman*, N.Y. TIMES (Jan. 26, 2020,

scholars, such as Professor He Weifang of Peking University Law School, have also made the connection between liberal freedoms and public health in their public statements. He Weifang has pointed out that the central government in Beijing knew about the epidemic several weeks before they announced it and took measures against it.<sup>71</sup> “Without press freedom,” He Weifang concludes, “people will live in distress and the government in mendacity.”<sup>72</sup> A similar belief is shared by the hundreds of Chinese academics who signed a petition in the early stages of the pandemic, calling, among other things, for the freedom of expression in China.<sup>73</sup> Xu Zhangrun, a politically liberal law professor, who was subsequently dismissed from his position at Tsinghua University, has expanded the argument to the systemic level.<sup>74</sup> In Xu’s view, China’s illiberal political system, enabled “dangerous ‘systemic impotence’ at every level.”<sup>75</sup> Other critics of the Chinese government’s response have argued that the absence of a functioning civil society in China hampered the government’s efforts in the pandemic.<sup>76</sup>

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updated Feb. 10, 2020); <https://www.nytimes.com/2020/01/26/world/asia/china-coronavirus-xi-jinping.html> [<https://perma.cc/9BXG-83E6>].

<sup>71</sup> Jun Mai & Mimi Lau, *Chinese Scholar Blames Xi Jinping, Communist Party for Not Controlling Coronavirus Outbreak*, S. CHINA MORNING POST (Feb. 6, 2020), <https://www.scmp.com/news/china/politics/article/3049233/chinese-scholar-blames-xi-jinping-communist-party-not> [<https://perma.cc/WAY9-45X7>].

<sup>72</sup> Cai, *supra* note 6.

<sup>73</sup> Mimi Lau, Echo Xie & Guo Rui, *Coronavirus: Li Wenliang’s Death Prompts Academics to Challenge Beijing on Freedom of Speech*, S. CHINA MORNING POST (Feb. 12, 2020),

<https://www.scmp.com/news/china/politics/article/3050086/coronavirus-hundreds-chinese-sign-petition-calling-freedom> [<https://perma.cc/Q2Q4-2X6D>].

<sup>74</sup> For background on Xu Zhangrun, see Geremie R. Barmé, *Xu Zhangrun Archive*, CHINA HERITAGE (Apr. 16, 2019), <http://chinaheritage.net/xu-zhangrun-許章潤> [<https://perma.cc/6FUU-H4Y4>]. For news about his dismissal, see Guo Rui, *China Leadership Critic Xu Zhangrun Sacked One Day After Release, Friends Say*, S. CHINA MORNING POST (Jul. 14, 2020),

<https://www.scmp.com/news/china/politics/article/3093119/china-leadership-critic-xu-zhangrun-sacked-one-day-after> [<https://perma.cc/N46T-XN89>].

<sup>75</sup> Xu Zhangrun, *Viral Alarm: When Fury Overcomes Fear*, CHINAFILE (Geremie R. Barmé trans., Feb. 10, 2020), <https://www.chinafile.com/reporting-opinion/viewpoint/viral-alarm-when-fury-overcomes-fear> [<https://perma.cc/R97S-GSP8>].

<sup>76</sup> Li Yuan, *In Coronavirus Fight, China Sidelines an Ally: Its Own People*, N.Y. TIMES (Feb. 19, 2020), <https://www.nytimes.com/2020/02/18/business/china-coronavirus-charity-supplies.html> [<https://perma.cc/4ASR-VW4J>].

The emphasis on civil and political rights is particularly prominent in the commentary on China's coronavirus response.<sup>77</sup> Outside the Chinese context, much of the rights-based commentary focuses on social and economic rights.<sup>78</sup> As is the case with past epidemics, the coronavirus pandemic has affected vulnerable groups with low socioeconomic status disproportionately.<sup>79</sup> People in lower socio-economic groups have been most adversely economically affected by both lockdowns and workplace infections.<sup>80</sup> Measures against the pandemic have impaired equal access to education.<sup>81</sup> It has been easier for governments to impose rights restrictions that most affect already disadvantaged and vulnerable groups.<sup>82</sup> The argument that inadequate protection of human rights is harming the public health response has also been raised in the present pandemic. In the United States, employees who cannot afford to take sick days due to poor employment protection and access to social and health

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<sup>77</sup> *But see* U.N. HUM. RTS. OFF. OF HIGH COMM'R, *supra* note 47, at 3 (discussing widespread racial discrimination and civil rights violations globally); UNAIDS, *supra* note 47, at 6–7 (discussing the relevance of democracy and freedom of speech for coronavirus measures globally).

<sup>78</sup> *See, e.g.*, WHO, *supra* note 47, at 1–2 (describing the worsening health and economic conditions of individuals with unstable economic conditions as a result of the coronavirus pandemic). For previous pandemics, see Svenn-Erik Mamelund et al., *The Association Between Socioeconomic Status and Pandemic Influenza: Protocol for a Systematic Review and Meta-Analysis*, SYSTEMATIC REV. 2 (Jan. 4, 2019), <https://systematicreviewsjournal.biomedcentral.com/track/pdf/10.1186/s13643-018-0931-2> [<https://perma.cc/G4VG-C695>] (associating socioeconomic risk factors with pandemic outcomes).

<sup>79</sup> *Id.*

<sup>80</sup> Geoffrey Anderson et al, *Using Socioeconomics to Counter Health Disparities Arising from the Covid-19 Pandemic*, 369 BRIT. MED. J. 1, 3–4 (June 8, 2020), <https://www.bmj.com/content/369/bmj.m2149> [<https://perma.cc/S3VS-NVD9>].

<sup>81</sup> *See* Statement on COVID-19 and Youth, United Nations Inter-agency Network on Youth Development, ¶ 7 (2020), [https://www.ohchr.org/Documents/Issues/Youth/COVID-19\\_and\\_Youth.pdf](https://www.ohchr.org/Documents/Issues/Youth/COVID-19_and_Youth.pdf) [<https://perma.cc/5NEN-DREY>] (pointing out that underprivileged youth often lack access to remote learning tools); U.N. HUM. RTS. OFF. OF HIGH COMM'R, *supra* note 47, at 4 (discussing widespread school closures globally).

<sup>82</sup> *See* U.N. HUM. RTS. OFF. OF HIGH COMM'R, *supra* note 47, at 7 (discussing the disparate impact of coronavirus on individuals in precarious employment situations).

services are more likely to contract and spread the disease.<sup>83</sup> Denying paperless immigrants access to healthcare and other services has a similar effect.<sup>84</sup> The rights-based approach to health, therefore, suggests that there is ultimately no trade-off between human rights and the containment of the coronavirus pandemic—what is good for human rights is good for public health.<sup>85</sup>

#### IV. QUESTIONING LIBERAL NARRATIVES

The Chinese government has adopted some elements of the above-described liberal narratives on the coronavirus pandemic. In

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<sup>83</sup> See, e.g., Max Fisher & Emma Bubola, *As Coronavirus Deepens Inequality, Inequality Worsens Its Spread*, N.Y. TIMES (Mar. 15, 2020), <https://www.nytimes.com/2020/03/15/world/europe/coronavirus-inequality.html> [<https://perma.cc/F4QK-LX7D>] (describing the economic conditions of low-income workers and the increased likelihood of contracting Covid-19 during the current pandemic); Faheem Ahmed et al., Comment, *Why Inequality Could Spread COVID-19*, 5(5) E240 LANCET PUB. HEALTH (Apr. 2, 2020), [https://doi.org/10.1016/S2468-2667\(20\)30085-2](https://doi.org/10.1016/S2468-2667(20)30085-2) [<https://perma.cc/Y2A9-RQWW>] (explaining the effects of the coronavirus pandemic on poor population groups).

<sup>84</sup> See *Portugal to Treat Migrants as Residents During Coronavirus Crisis*, REUTERS (Mar. 28, 2020), <https://www.reuters.com/article/us-health-coronavirus-portugal/portugal-to-treat-migrants-as-residents-during-coronavirus-crisis-idUSKBN21F0N7> [<https://perma.cc/65QV-9FGW>] (explaining the rationale for granting permanent status to foreigners with pending applications); Miriam Jordan, *We're Petrified': Immigrants Afraid to Seek Medical Care for Coronavirus*, N.Y. TIMES (Mar. 18, 2020), <https://www.nytimes.com/2020/03/18/us/coronavirus-immigrants.html> [<https://perma.cc/6D6B-MTR6>] (describing undocumented immigrants' fear of seeking medical attention with potential coronavirus symptoms).

<sup>85</sup> International organizations employ both the conventional and the more holistic rights-based narrative in their commentary on the pandemic. The WHO Director General has stated that “[a]ll countries must strike a fine balance between protecting health . . . and respecting human rights.” Tedros Adhanom Ghebreyesus, *WHO Director-General's Opening Remarks at the Media Briefing on COVID-19—11 March 2020*, WORLD HEALTH ORGANIZATION [WHO] (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--11-march-2020> [<https://perma.cc/9TCP-GDDN>]. WHO's policy paper on human rights and the coronavirus pandemic, in contrast, stresses the holistic rights-based approach to health, stating that “[h]uman rights frameworks provide a crucial structure that can strengthen the effectiveness of global efforts to address the pandemic.” WHO, *supra* note 49, at 1.

addition to seeking to protect the employment rights of coronavirus patients, the government has denounced the local authorities' initial suppression of information about the outbreak.<sup>86</sup> Nevertheless, the overall message of the P.R.C. government has been that China's one-party state has been crucial for tackling the pandemic.<sup>87</sup>

Before discussing the Chinese government's perspective to the pandemic, it may be helpful to note that the above-described liberal assumptions about public health have been contested outside China as well. This criticism takes many forms, but most fundamentally, it proposes that the liberal project to justify social arrangements through the liberal first principles must fail.<sup>88</sup> In reality, it may be argued, liberal narratives exist to provide a layer of ideological gloss for political decisions that do not follow from the above-described first principles of liberalism.<sup>89</sup> Depending on who is speaking, the quarantining of cities, regions, and countries may be deemed disproportionate and excessive—or these measures may be accepted as proportionate and the least restrictive measures available, considering the available resources and information. It is not the philosophical premises of liberalism that determine the use and acceptability of these measures, but something else altogether: the political culture of a given country, the competence and sensibilities of decision-makers, the resources available to public health authorities, the risk tolerance of decision-makers and citizens, and so forth. The same argument can be extended to the efficacy of public

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<sup>86</sup> See SUP. PEOPLE'S CT., *supra* note 17; SUP. PEOPLE'S CT., *supra* note 52. See also Li Yuan, *Coronavirus Crisis Exposes Cracks in China's Facade of Unity*, N.Y. TIMES (Jan. 28, 2020), <https://www.nytimes.com/2020/01/28/business/china-coronavirus-communist-party.html> [<https://perma.cc/H7Z4-VA2Z>]; Steven Lee Myers, *Xi Goes to Wuhan, Coronavirus Epicenter*, in *Show of Confidence*, N.Y. TIMES (Mar. 10, 2020), <https://www.nytimes.com/2020/03/10/world/asia/coronavirus-china-xi-jinping.html> [<https://perma.cc/P5HJ-BJMU>]; *Probe Findings on Li Wenliang Mark Start of Reflection, Holding Accountability*, GLOB. TIMES (Mar. 20, 2020), <https://www.globaltimes.cn/content/1183211.shtml> [<https://perma.cc/8CJP-Z6U5>] (discussing the central Chinese government's investigation into the suppression of whistleblower Dr. Li Wenliang).

<sup>87</sup> See P.R.C. STATE COUNCIL, *supra* note 11, and *infra* text accompanying notes 104–106.

<sup>88</sup> See Michael J. Sandel, *Political Liberalism*, 107 HARV. L. REV. 1765, 1767–68 (1994) (reviewing JOHN RAWLS, *POLITICAL LIBERALISM* (1993)).

<sup>89</sup> See *supra* text accompanying note 29.

health measures. The efficiency of public health measures in the present pandemic has depended on governmental competence, state capacity and the public's trust in the state government—not on whether the government is liberal or not.<sup>90</sup> Illiberal regimes may be competent and capable in certain regards, and at times they may even enjoy the public's trust.<sup>91</sup> Relatedly, both liberal and illiberal governments have failed their citizens in numerous ways in the coronavirus pandemic.<sup>92</sup>

From a critical perspective, it also appears that there are few, if any, self-evident consequences from the respect for individual freedom and human agency, autonomy and dignity for public health policies and measures. For instance, a critic may point out that neither the expansion nor the restriction of the freedom of expression inevitably leads to better public health outcomes. In fact, liberal vocabulary is not incompatible with restricting the freedom of expression in order to achieve public health objectives. Such restrictions may even justify giving effect to individual agency, autonomy and human dignity. For instance, European courts have made health-related commercial speech “conditional upon the disclosure of sufficient and reliable information to consumers.”<sup>93</sup> The justification for restrictions on such speech is not only the promotion of public health objectives (and, one may argue, the right to health) but also the promotion of individual autonomy, which is contingent on allowing individuals to make decisions on an informed basis.<sup>94</sup> Respect for individual autonomy and human dignity may, therefore, justify restrictions on the freedom of expression in the field of public health. Conversely, liberal vocabulary may also be used to advocate the freedom of expression at the expense of public health

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<sup>90</sup> Fukuyama, *supra* note 1.

<sup>91</sup> *Id.* For instance, Donald Clarke has argued that whatever trust investors may have in the Chinese government need not be based on formal enforceable rights. Donald C. Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 AM. J. COMP. L. 89, 109–111 (2003).

<sup>92</sup> See *infra* note 163.

<sup>93</sup> Amandine Garde, *Freedom of Commercial Expression and the Public Health Protection in Europe*, 12 CAMBRIDGE Y.B. EUR. LEGAL STUD. 225, 226 (2009–2010).

<sup>94</sup> *Id.* at 231. See also Lars Noah, *Truth or Consequences?: Commercial Free Speech vs. Public Health Promotion (at the FDA)*, 21 HEALTH MATRIX 31, 90–92 (2011) (discussing the possibility of the U.S. government restricting truthful commercial speech for public health reasons).

objectives. This is the case when pharmaceutical companies are allowed a wide scope of commercial speech, despite the adverse public health consequences of such speech.<sup>95</sup>

Rather than assuming that the human rights-based framework provides a single coherent policy framework for the coronavirus response, a critic may argue that rights claims in the coronavirus pandemic—say, claims about the right to health and the right to education—are mutually incompatible.<sup>96</sup> A critic may also point out that the human rights-based approach recognizes no hierarchies between human rights and instead contends that all rights are interrelated and mutually re-enforcing.<sup>97</sup> Such a posture provides no guidance on how to divide scarce resources in a public health emergency. The interrelatedness of all human rights has made the human rights-based approaches analytically fuzzy. It has also made the advocacy of the human rights-based approaches a difficult task in the public health community and especially within the WHO.<sup>98</sup>

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<sup>95</sup> See David Orentlicher, *The Commercial Speech Doctrine in Health Regulation: The Clash Between the Public Interest in a Robust First Amendment and the Public Interest in Effective Protection from Harm*, 37 AM. J.L. & MED. 299, 305 (2011) (discussing first amendment challenges against pharmaceutical promotions); Sarah A. Roache et al., *Big Food and Soda Versus Public Health: Industry Litigation Against Local Government Regulations to Promote Healthy Diets*, 45 FORDHAM URB. L.J. 1051, 1079–1083 (2018) (discussing first amendment challenges against public health warning labels).

<sup>96</sup> In the early stages of the pandemic, the United Nations Educational, Scientific and Cultural Organization (UNESCO) outlined several ways in which the “temporary school closures . . . could threaten the right to education.” According to UNESCO, the school closures could negatively impact learning achievement, decrease economic productivity, and compound inequality. *Coronavirus Update: 290 Million Students Now Stuck at Home*, U.N. NEWS (Mar. 5, 2020), <https://news.un.org/en/story/2020/03/1058791> [<https://perma.cc/T5RQ-8CR5>]. See also David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, 113 (2002) (describing how human rights can create conflicts).

<sup>97</sup> U.N. POP. FUND [UNFPA] & HARVARD SCH. PUB. HEALTH, A HUMAN RIGHTS-BASED APPROACH TO PROGRAMMING: PRACTICAL INFORMATION AND TRAINING MATERIALS 458 (2010).

<sup>98</sup> See Helena Nygren-Krug, *The Right to Health: From Concept to Practice*, in ADVANCING THE HUMAN RIGHT TO HEALTH 39, 40 (Jose M. Zuniga et al. eds., 2013) (describing the conflicted ways in which human rights may be postulated); Seppänen, *supra* note 24, at 439.

Finally, a strand of criticism argues that the liberal emphasis on legal processes is misplaced and unjustified.<sup>99</sup> There are sound policy reasons for not subjecting all public health policies to judicial review even in a liberal democracy. On the one hand, it can be argued that there is no necessary link between the liberal first principles and the *judicial* review of public health measures. The Siracusa Principles, for instance, refrain from calling for the judicial review of government decisions, being satisfied with “[a]dequate safeguards and effective remedies” for controlling abuses of power.<sup>100</sup> On the other hand, it can be argued that the distribution of healthcare resources is too important a function to be left for the court system to decide. In jurisdictions where the right to health may be litigated, legal disputes about this right end up in courts in a more or less random order, and judges deciding such cases typically have insufficient resources to do so.<sup>101</sup>

## V. ILLIBERAL EXCEPTIONALISM

The above-described criticisms do not need to justify illiberal policies or political systems. Instead, they may be intended to expose the repressiveness and arbitrariness of liberal ideology in a call for more authentic human emancipation than what mainstream human rights language caters for. Nevertheless, these criticisms may also justify illiberal forms of government. In China, in particular, the critique of liberal narratives takes a politically meaningful form.<sup>102</sup>

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<sup>99</sup> See Kennedy, *The International Human Rights Movement*, *supra* note 96, at 110 (describing the attachment of the human rights movement to legal machinery).

<sup>100</sup> SIRACUSA PRINCIPLES, *supra* note 3, at 18.

<sup>101</sup> See Siri Gloppen, *Litigation as a Strategy to Hold Governments Accountable for Implementing the Right to Health*, 10 HEALTH & HUM. RTS., no. 2, 2008, at 21, 24 (noting the casuistic nature of litigation in health promotion). See also David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT’L L.J. 189, 199–200 (2012) (describing the accrual of benefit to higher social classes when social rights are enforced in court).

<sup>102</sup> For an overview of Chinese critical scholarship, see generally Samuli Seppänen, *Ideological Renewal and Nostalgia in China’s “Avant-garde” Legal Scholarship*, 13 WASH. U. GLOB. STUD. L. REV. 83 (2014) (discussing three different strands of contemporary Chinese “avant-garde” legal scholarship). For a specific text, see JIANG SHIGONG (强世功), LIFAZHE DE FALIXUE (立法者的法理



Indeed, the ongoing coronavirus pandemic has provided an opportunity for the Chinese leadership to taunt the superiority of Chinese-style socialism compared to liberal democracies. “Were it not for the unique institutional advantages of the Chinese system,” the China Daily explained (somewhat prematurely) in February 2020, “the world might be battling a devastating pandemic.”<sup>103</sup>

According to Xi Jinping, the Chinese government’s actions in the coronavirus outbreak “once again demonstrated the notable advantages of the leadership of the [CCP] and the system of socialism with Chinese characteristics.”<sup>104</sup> In Xi’s view, the CCP was able to deploy resources swiftly to fight the epidemic under the centralized, unified leadership of the Party.<sup>105</sup> China’s state-run media has advanced similar arguments about the benefits of the Chinese governance model. In liberalism the “state is a ‘necessary evil’ and its presence must be contained, otherwise it infringes on the rights of individuals,” whereas in the Chinese political tradition and in “eastern civilizations . . . the state, the Party and the people have

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学) [LEGISLATORS’ JURISPRUDENCE] 10–12 (2007) (arguing that Chinese legal research should not become the stage of Western ideology).

<sup>103</sup> *China’s Unprecedented Measures Prevent Novel Coronavirus Infecting the World*, CHINA DAILY (Feb. 20, 2020), <https://www.chinadaily.com.cn/a/202002/20/WS5e4e7a7ca310128217279147.html> [https://perma.cc/628F-F39Z]. See also *China’s Propagandists are Trapped by Their Own Rhetoric*, ECONOMIST (Mar. 5, 2020), <https://www.economist.com/china/2020/03/05/chinas-propagandists-are-trapped-by-their-own-rhetoric> [https://perma.cc/34MY-VAV4] (arguing that the promises of China’s propagandists can never be realized).

<sup>104</sup> *Xi Stresses Unremitting Efforts in COVID-19 Control, Coordination on Economic, Social Development*, XINHUA (Feb. 24, 2020), [http://www.xinhuanet.com/english/2020-02/24/c\\_138811372.htm](http://www.xinhuanet.com/english/2020-02/24/c_138811372.htm) [https://perma.cc/C8A3-5TP5].

<sup>105</sup> *Id.* For the same argument by a Chinese scholar specializing on Marxism in the Chinese Academy of Social Sciences, see Liu Zhongxun (刘忠勋), *Cong Yiqing Fangkong Kan Woguo Zhidu Youshi he Zhili Xiaoneng* (从疫情防控看我国制度优势和治理效能) [From the Perspective of Epidemic Prevention and Control: China’s Institutional Advantages and Governance Effectiveness], CHINESE SOC. SCI. NET (Mar. 13, 2020), <http://marx.cssn.cn> [https://perma.cc/875D-UPUG] (attributing the success in controlling the pandemic to China’s institutional advantages and the leadership of the CCP). See also P.R.C. STATE COUNCIL, *supra* note 11 (stating that “[a]fter weathering the epidemic, the Chinese people have keenly realized that the [CCP] leadership is the most reliable shelter against storms.”).

shared interests.”<sup>106</sup> Chinese media has cited the so-called community grid management system as a specific example of China’s state-centric and communal approach to public health.<sup>107</sup> This system makes use of idiosyncratic Chinese governance institutions, such as neighborhood-level Party committees and their staff members as well as community-level healthcare providers, in disease control.<sup>108</sup>

Yet, instead of extolling the benefits of a Marxist-Leninist dictatorship, Chinese Party leaders and ideologues often emphasize more widely appealing aspects of the Party’s governance model, such as the socialist rule of law principle.<sup>109</sup> This principle not only comprises the strict obedience to the law, but also values such as equality before the law and (supposedly “socialist”) notions of formal

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<sup>106</sup> *Community Grid System Helps China Fight Virus*, GLOB. TIMES (Feb. 5, 2020), <https://www.globaltimes.cn/content/1178528.shtml> [<https://perma.cc/DPH7-H6ZC>].

<sup>107</sup> The “grid management system” (网格化管理) [Wanggehua Guanli] is a scarcely studied aspect of Chinese governance. See Beibei Tang, *Grid Governance in China's Urban Middle-class Neighbourhoods*, 241 CHINA Q. 43, 43 (2020) (“[T]he grid governance scheme has become a major vehicle for resident mobilization . . . to reinforce the Party’s leadership . . .”); see also Yongshun Cai, *Grid Management and Social Control in China*, ASIA DIALOGUE (Apr. 27, 2018), <https://theasiadialogue.com/2018/04/27/grid-management-and-social-control-in-china/> [<https://perma.cc/GXR4-RLDF>] (describing the grid management system as a signal of the “government’s tightened monitoring of society” in China).

<sup>108</sup> See Tang, *supra* note 107, at 49–50 (describing the role of neighborhood-level Party committees); Guanyu Jiaqiang Xinxing Guanzhuang Bingdu Ganran de Feiyan Yiqing Shequ Fangkong Gongzuo de Tongzhi (关于加强新型冠状病毒感染的肺炎疫情社区防控工作的通知) [Notice on Strengthening Community Efforts on the Prevention and Control of the Novel Coronavirus Pneumonia Epidemic] (Jan. 24, 2020), [https://mp.weixin.qq.com/s/fjBfo-6lx\\_HksDP8\\_4C8sQ](https://mp.weixin.qq.com/s/fjBfo-6lx_HksDP8_4C8sQ) [<https://perma.cc/CGZ9-DXMD>] (describing the institutional arrangements for the prevention and control of the pandemic), translated in CHINA L. TRANSLATE, <https://www.chinalawtranslate.com/en/ncov-community-measures/> [<https://perma.cc/8LXZ-5VYM>]. See also P.R.C. STATE COUNCIL, *supra* note 11 (describing the Chinese prevention and control system, which involves all sectors of society).

<sup>109</sup> Even the above-cited Global Times article emphasizes that the grid management system “is not an authoritarian machine.” See GLOB. TIMES, *Community Grid System*, *supra* note 106.

and substantive justice.<sup>110</sup> Texts referring to this ideal allude to the notion of “Party leadership”, but the meaning of such leadership is seldom fleshed out in these texts or described as unbridled political domination.<sup>111</sup> The Party is, according to its own self-perception, a modern, scientifically governed, rule-based organization.<sup>112</sup>

The Chinese leadership and Xi Jinping himself have emphasized the rule-based nature of the Party’s governance model in their response to the coronavirus pandemic. Early on in the outbreak, Xi published an article in *Qiushi*, the Party’s principal theoretical journal, arguing that it was of utmost importance to fight the epidemic in a “law-based, scientific and orderly manner.”<sup>113</sup> The harder epidemic control and prevention was, Xi explained, the more important it was to adhere to the “rule of law” and to strengthen Chinese legislation on public health.<sup>114</sup> A similar focus on legality can be found in the P.R.C. State Council’s white paper on the government’s response to the pandemic.<sup>115</sup> The white paper explains that the government strengthened legal safeguards for epidemic prevention and control during the pandemic.<sup>116</sup>

One aspect of this law-based response can be found in the Chinese Supreme People’s Court guiding opinions and model cases

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<sup>110</sup> See ZHONGGONG ZHONGYANG ZHENGFA WEIYUANHUI (中共中央政法委员会) [CENTRAL POLITICAL & LEGAL COMMITTEE OF THE CHINESE COMMUNIST PARTY], SHEHUI ZHUYI FAZHI LINIAN DUBEN (社会主义法治理念读本) [Readings on the Socialist Rule of Law Principle] 98–99, 104–109 (2009).

<sup>111</sup> See, e.g., *id.* at 111 (describing Party leadership as ideological leadership, political leadership and organizational leadership, without elaborating on the relationship between the Party and the judiciary).

<sup>112</sup> XI JINPING, THE GOVERNANCE OF CHINA (VOL. 1), 9–10, 19–20, 54, 89 (2014).

<sup>113</sup> Xi Jinping (习近平), *Quanmian Tigao Yifa Fangkong Yifa Zhili Nengli, Jianquan Guojia Gonggong Weisheng Yingji Guanli Tixi* (全面提高依法防控依法治理能力, 健全国家公共卫生应急管理体系) [Comprehensively Improving Law-Based Epidemic Prevention and Control and the National Public Health Emergency Management System], QIUSHI (求是) [SEEKING TRUTH] (Feb. 29, 2020), [http://www.qstheory.cn/dukan/qs/2020-02/29/c\\_1125641632.htm](http://www.qstheory.cn/dukan/qs/2020-02/29/c_1125641632.htm) [<https://perma.cc/GBK7-MBYU>] [hereinafter *Xi, Comprehensively Improving*]. For an English language description of the article, see *Xi’s Article on Improving Epidemic Prevention and Control to be Published*, XINHUA (Mar. 1, 2020), [http://www.china.org.cn/china/2020-03/01/content\\_75760592.htm](http://www.china.org.cn/china/2020-03/01/content_75760592.htm) [<https://perma.cc/5J96-W452>].

<sup>114</sup> Xi, *Comprehensively Improving*, *supra* note 113.

<sup>115</sup> P.R.C. STATE COUNCIL, *supra* note 11.

<sup>116</sup> *Id.*

on coronavirus cases.<sup>117</sup> In part, the Supreme People's Court's guidance supports individual rights. In its first set of guiding opinions on the coronavirus response, the Supreme People's Court stated that Chinese people's courts would not support the termination of employment contracts of employees who were suspected or confirmed coronavirus patients.<sup>118</sup> At the same time, the Supreme People's Court also made use of the self-consciously pragmatic aspects of Chinese legal thought, which emphasize the "social effects", rather than the "legal effects" of a legal decision.<sup>119</sup> In its guiding opinions, the Supreme People's Court instructed lower level people's courts to mitigate adverse economic effects from the

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<sup>117</sup> See SUP. PEOPLE'S CT., *supra* note 17; *Guanyu Yifa Tuoshan Shenli She Xinguan Feiyan Yiqing Minshi Anjian Ruogan Wenti de Zhidao Yijian (Yi)* (关于依法妥善审理涉新冠肺炎疫情民事案件若干问题的指导意见 (一)) [Guiding Opinions Concerning the Proper Hearing of Cases Related to the Novel Coronavirus Epidemic (First)], SUP. PEOPLE'S CT. PEOPLE'S REPUBLIC OF CHINA (Apr. 20, 2020), <http://www.court.gov.cn/zixun-xiangqing-226241.html> [<https://perma.cc/MYW8-5HTW>] (instructing lower courts to ensure the function of judiciary services); *Guanyu Yifa Tuoshan Shenli She Xinguan Feiyan Yiqing Minshi Anjian Ruogan Wenti de Zhidao Yijian (Er)* (关于依法妥善审理涉新冠肺炎疫情民事案件若干问题的指导意见 (二)) [Guiding Opinions Concerning the Proper Hearing of Cases Related to the Novel Coronavirus Epidemic (Second)], SUP. PEOPLE'S CT. PEOPLE'S REPUBLIC OF CHINA (May 19, 2020), <http://www.court.gov.cn/zixun-xiangqing-230181.html> [<https://perma.cc/Z9R8-72D7>] (instructing lower courts on issues related to contracts, finance, and bankruptcy); *Guanyu Yifa Tuoshan Shenli She Xinguan Feiyan Yiqing Minshi Anjian Ruogan Wenti de Zhidao Yijian (San)* (关于依法妥善审理涉新冠肺炎疫情民事案件若干问题的指导意见 (三)) [Guiding Opinions Concerning the Proper Hearing of Cases Related to the Novel Coronavirus Epidemic (Third)], SUP. PEOPLE'S CT. PEOPLE'S REPUBLIC OF CHINA (June 8, 2020), <https://www.chinacourt.org/law/detail/2020/06/id/150170.shtml> [<https://perma.cc/VZE4-JUP5>] (instructing lower courts on civil procedure).

<sup>118</sup> *Guanyu Yifa Tuoshan Shenli She Xinguan Feiyan Yiqing Minshi Anjian Ruogan Wenti de Zhidao Yijian (Yi)* (关于依法妥善审理涉新冠肺炎疫情民事案件若干问题的指导意见 (一)) [Guiding Opinions Concerning the Proper Hearing of Cases Related to the Novel Coronavirus Epidemic (First)], *supra* note 117, ¶ 4.

<sup>119</sup> OFFICE OF THE CENTRAL POLITICAL AND LEGAL AFFAIRS COMMISSION OF THE CHINESE COMMUNIST PARTY, SHEHUI ZHUYI FAZHI LINIAN XUEXI WENDA (社会主义法治理念学习问答) [Questions and Answers on the Socialist Rule of Law Concept] 31, 191 (2012).

pandemic through mediation and negotiation.<sup>120</sup> The model cases released to illustrate this aim describe how Chinese businesses from fitness clubs to building companies and slaughter houses have been able to default on their contractual obligations without being forced into liquidation.<sup>121</sup> The Chinese people's courts' role in the coronavirus response is not, therefore, only to enforce individual rights but also to prevent the enforcement of such rights from causing harmful social effects.<sup>122</sup>

The Party's response to the pandemic is not limited to legal processes even in their most pragmatic form. A Marxist-Leninist political party, such as the CCP, does not base its legitimacy on the observance of legal processes or, it can be argued, any other rules, including its own internal regulations.<sup>123</sup> Instead of adhering to legal and other rule-based processes, the supposed advantage of a communist party leadership compared to liberal democracies is its ability to embody the will of the proletariat, which is remaking the world under the laws of dialectical and historical materialism.<sup>124</sup> CCP ideology presumes that the Party represents "advanced

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<sup>120</sup> *Guanyu Yifa Tuoshan Shenli She Xinguan Feiyan Yiqing Minshi Anjian Ruogan Wenti de Zhidao Yijian (Yi)* (关于依法妥善审理涉新冠肺炎疫情民事案件若干问题的指导意见 (一)) [*Guiding Opinions Concerning the Proper Hearing of Cases Related to the Novel Coronavirus Epidemic (First)*], *supra* note 117, ¶ 1.

<sup>121</sup> *Quanguo Fayuan Fuwu Baozhang Yiqing Fangkong Qijian Fugong Fuchan Dianxing Anli (Di San Pi)* (全国法院服务保障疫情防控期间复工复产典型案例 (第三批)) [*Nationwide Model Cases for Ensuring the Resumption of Work and Production During the Prevention and Control of the Epidemic (Third Batch)*], SUP. PEOPLE'S CT. PEOPLE'S REPUBLIC OF CHINA (Apr. 22, 2020), <http://www.court.gov.cn/zixun-xiangqing-226771.html> [<https://perma.cc/ZQD8-Q3EQ>].

<sup>122</sup> For similar legislative measures in other countries, see *supra* note 18.

<sup>123</sup> For an example of this attitude, see, for example, VLADIMIR LENIN, *THE PROLETARIAN REVOLUTION AND THE RENEGADE KAUTSKY* (1918), *reprinted in* V.I. LENIN COLLECTED WORKS 28, 105 (2nd ed. 1974), [www.marxists.org/archive/lenin/works/1918/oct/10.htm](http://www.marxists.org/archive/lenin/works/1918/oct/10.htm) [<https://perma.cc/9KTL-J8WN>] (describing the dictatorship of the proletariat as the suppression of bourgeois liberty and equality). I have discussed the role of rules in the CCP's governance project elsewhere. See Samuli Seppänen, *Interrogating Illiberalism Through Chinese Communist Party Regulations*, 52 CORNELL INT'L L.J. 267 (2019).

<sup>124</sup> See generally LENIN, *supra* note 123 (explaining the advantages of communist party leadership).

production forces, advanced culture and the overwhelming majority of the Chinese people.”<sup>125</sup> Since the actions of Party leaders are presumed to reflect the advanced forces in society, it is ultimately up to the Party leaders to decide when to follow established legal and other rule-based processes and when to abstain from them.<sup>126</sup> Formal legality is, therefore, a concern for Party leaders and ideologues, but it does not have the same role in the CCP’s governance project as it does in the liberal narratives on public health.

One consequence of this governance model is skepticism towards formal bureaucratic processes. Early on in the coronavirus outbreak, Xi Jinping warned about the dangers of “bureaucratism and the practice of formalities for formalities’ sake,” which slowed the government’s effort to contain the outbreak.<sup>127</sup> An editorial in the influential People’s Daily opined that “formalism” was a “chronic disease and no less contagious than an epidemic.”<sup>128</sup> Indeed, Wuhan

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<sup>125</sup> See *What Is “Three Represents” CPC Theory?*, CHINA.ORG.CN, <http://www.china.org.cn/english/zhuanti/3represents/68735.htm> [<https://perma.cc/Y5DU-6LSB>] (last visited Apr. 7, 2020) (explaining the “Three Represents”).

<sup>126</sup> Among other things, this implication is achieved through the principle of democratic centralism, which holds that “all Party members must . . . firmly uphold the authority and centralized, unified leadership of the Central Committee with Comrade Xi Jinping at the core . . .” *Zhongguo Gongchandang Zhangcheng* (中国共产党章程) [Constitution of the Communist Party of China] (rev’d by and adopted at the 19th National Congress of the Communist Party of China, Oct. 24, 2017), § General Program, [http://language.chinadaily.com.cn/19thpcnationalcongress/2017-11/06/content\\_34191468.htm](http://language.chinadaily.com.cn/19thpcnationalcongress/2017-11/06/content_34191468.htm) [<https://perma.cc/ZB5D-NVLD>] (introducing the principle of democratic centralism). The matter is, however, paradoxical, since the Party also instructs its members to “set a fine example in abiding by the laws and regulations of the state.” *Id.* at art. 3. See also LIU, *infra* note 171 (discussing the principles established in the Constitution of the Communist Party of China).

<sup>127</sup> See Wang, *Two Important Meetings, supra* note 19 (urging the importance of suppressing formalism and bureaucratism). For English language commentary on Xi Jinping’s statement, see *Deaths in China Rise, With No Sign of Slowdown*, N.Y. TIMES (Feb. 4, 2020, updated Mar. 12, 2020), <https://www.nytimes.com/2020/02/04/world/asia/coronavirus-china.html?emc=rss&partner=rss> [<https://perma.cc/8BW9-CN6D>].

<sup>128</sup> See *Fangkong ye Gao Xingshi Zhuyi, Yao Zewen Geng Yao Wenze* (防控也搞形式主义, 要责问更要问责) [Formalism in Prevention and Control Must Be Called to Account and Condemned], PEOPLE’S DAILY (Feb. 2, 2020),

authorities' failure to take timely action against the coronavirus outbreak can be seen as a consequence of the ills of bureaucratism and formalism. As a new disease, coronavirus was not on a list of designated infectious diseases, which would have triggered reporting obligations within the Chinese healthcare system.<sup>129</sup> The “bureaucratic and formalist” organizational culture—in effect, rigid and hierarchical reporting mechanisms and the incentives to avoid responsibility for unwelcome news—allowed local authorities in Wuhan to keep Beijing in the dark about the outbreak.<sup>130</sup> Party leaders, therefore, aim to ensure that “formalism” does not stand in way of effective disease control. One means for doing this is the Party’s internal discipline supervision. Discipline supervision is “extra-legal” in the sense that it is outside the purview of the Chinese people’s courts (which themselves are under the Party’s control).<sup>131</sup> In the context of the coronavirus pandemic, the Party’s Central Commission for Discipline Inspection (CCDI) has decreed that Party cadres must “deeply understand the spirit of General Secretary Xi Jinping’s important instructions and important speeches.”<sup>132</sup> The

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<http://opinion.people.com.cn/n1/2020/0202/c1003-31567364.html>

[<https://perma.cc/69Q2-EHNZ>] (appealing to officials to refuse formalism).

<sup>129</sup> See generally Wang Xixin (王锡锌), *Chuanranbing Yiqing Xinxi Gongkai de Zhang'ai ji Kefu* (传染病疫情信息公开的障碍及克服) [*The Obstacles of, and Solutions for, Information Disclosure in Infectious Disease Pandemics*], FAXUE (Mar. 28, 2020), <https://mp.weixin.qq.com/s/raqY4vNJmKz2UCHTEQgpZg> [<https://perma.cc/YSX2-AEET>] (reviewing the rules for information disclosure of infectious disease pandemics).

<sup>130</sup> For Chinese legal scholarship discussing the problems with the organizational culture in the pandemic, see Wang Jianglian (汪江连), *Xinguan Feiyan Yiqing Fangkong ying Shiyong “Weiji Fazhi”* (新冠肺炎疫情防控应适用“危机法治”) [*Apply “Crisis Rule of Law” to Coronavirus Epidemic Prevention and Control*], PKU L. (Feb. 19, 2020),

[http://pkulaw.cn/fulltext\\_form.aspx?Gid=335655869&Db=art](http://pkulaw.cn/fulltext_form.aspx?Gid=335655869&Db=art)

[<https://perma.cc/3XRS-FVHU>] (arguing the importance of adopting “crisis rule of law” to combat bureaucratism). See also GLOB. TIMES, *Probe Findings on Li Wenliang*, *supra* note 86 (describing how local authorities prevented Dr. Li Wenliang from posting the information of the pandemic online).

<sup>131</sup> See generally FLORA SAPIO, SOVEREIGN POWER AND THE LAW IN CHINA 8 (2010) (discussing shuanggui as well as other legal exceptions in China); Ling Li, *Political-Legal Order and the Curious Double Character of China’s Courts*, 6 ASIAN J.L. & SOC’Y 19, 31, 36–37 (2019) (discussing the Party’s supremacy in making, interpreting, applying, and enforcing the law).

<sup>132</sup> CCDI, *supra* note 21.

staff in discipline inspection commissions must also “struggle heroically” and target “formalist bureaucratic practices.”<sup>133</sup>

Perhaps as a consequence of the Party’s ambiguous approach to formalism and legality (which are two separate issues), some of the disease control measures deployed by the Chinese government in the coronavirus pandemic have allegedly violated Chinese laws, as mentioned in Part II above. Professor Shen Kui of Peking University Law School, for instance, has pointed out that all restrictions on the personal rights of Chinese citizens need to be based on laws adopted by the National People’s Congress and its Standing Committee.<sup>134</sup> In the field of public health, the use of coercive measures, such as isolations, quarantines and lockdowns, must follow the processes set up in the P.R.C. Law on the Prevention and Control of Infectious Diseases.<sup>135</sup> Shen Kui argues that many measures adopted by local authorities, such as the coercive home quarantining of people in Zhejiang province described in Part II above, violated this process.<sup>136</sup> Professor Tong Zhiwei from the East China University of Political Science and Law has expressed similar concerns about the coercive isolation of people in their homes.<sup>137</sup> Zhao Hong, a professor at the China University of Political Science and Law in Beijing, has argued that restrictions on the freedom of movement in large Chinese cities and the banning of public gatherings “clearly violated legal

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<sup>133</sup> *Id.*

<sup>134</sup> *See generally* Shen, *supra* note 20 (urging the importance of respecting basic human rights in the pandemic).

<sup>135</sup> *Id.*; *see generally* Zhonghua Renmin Gongheguo Chuanranbing Fangzhi Fa (中华人民共和国传染病防治法) [P.R.C. Law on the Prevention and Control of Infectious Diseases] (promulgated and rev’d by the Standing Comm. Nat’l People’s Cong., June 28, 2004, effective Dec. 1, 2004), art. 43 [hereinafter *P.R.C. Law on the Prevention and Control of Infectious Diseases*] (stipulating the procedural requirements for the declaration of affected areas, the adoption of emergency measures, and the implementation of lockdowns).

<sup>136</sup> *See* Shen, *supra* note 20 (arguing against measures infringing personal freedom).

<sup>137</sup> *See* Tong, *supra* note 20 (criticizing measures adopted by local governments to limit personal freedom).



stipulations.”<sup>138</sup> Concerns about rights infringements in the pandemic have also appeared in the Chinese mainstream media.<sup>139</sup>

## VI. IDEOLOGICAL UNMASKING

Advocates of both liberal and illiberal narratives can argue that the coronavirus pandemic reveals endemic weaknesses in the opposite ideological outlook. From the illiberal perspective, the pandemic has demonstrated that liberal governments are inefficient and hypocritical.<sup>140</sup> The critique against the inefficiency of liberal regimes is a classic theme in illiberal political thought. Nineteenth and twentieth century opponents of liberalism argued that liberal governments were unwilling to restrict civil and political rights in an emergency situation and, as a consequence, they were unable to fight against various emergencies and political insurgences, in particular.<sup>141</sup> From the illiberal perspective, specific concepts of

<sup>138</sup> Matthew Walsh et al., *China's Super-Strict City Lockdowns May Be Illegal*, CAIXIN GLOB. (Feb 18, 2020), <https://www.caixinglobal.com/2020-02-18/chinas-super-strict-city-lockdowns-may-be-illegal-101517249.html> [<https://perma.cc/V8HA-74DC>].

<sup>139</sup> See generally Cai Fei (蔡斐), *Ruci Zhan “Yi”, Qunzhong hen Shengqi (如此战“疫”, 群众很生气) [In This Battle Against the Epidemic, People Are Upset]*, RENMINWANG (Feb. 17, 2020), <http://opinion.people.com.cn/n1/2020/0217/c223228-31591169.html> [<https://perma.cc/EK3U-F5XS>] (discussing the need for strict law application in emergency situations).

<sup>140</sup> See generally MO, *supra* note 11; Wang Xiangsui (王湘穗), *Yihou Shidai de Quanqiu Geju yu Zhong-Mei Guanxi (疫后时代的全球格局与中美关系) [The Global Landscape of the Post-Epidemic Era and Sino-US Relations]*, AI SIXIANG (May 15, 2020), <http://www.aisixiang.com/data/121697.html> [<https://perma.cc/F56J-GH8A>] (arguing that the U.S. and Europe have fared poorly in their coronavirus response and discussing the U.S. President Donald Trump’s effort to shift the blame for the inefficient coronavirus response to China); Yang Sheng, *Trump Tweet Infuriates China*, GLOB. TIMES (Mar. 18, 2020), <https://www.globaltimes.cn/content/1182873.shtml> [<https://perma.cc/47MX-EBBU>] (discussing the opinion that U.S. President Donald Trump is trying to “cover his administration’s terrible response” by blaming China).

<sup>141</sup> See generally JUAN DONOSO CORTÉS, *SPEECH ON DICTATORSHIP* (1849), *reprinted in* SELECTED WORKS OF JUAN DONOSO CORTÉS 45, 46 (Jeffrey P. Johnson trans., 2000) (stating that a dictatorship is a legitimate form of governance when law is not enough to save society); CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 63 (George

liberal legal thought, such as the principle of proportionality, encourage inaction in the face of public health emergencies.<sup>142</sup> In the coronavirus pandemic, a critic may argue, principles and processes that were designed for previous epidemics delayed or prevented liberal democracies from taking measures that were necessary to combat the new virus.<sup>143</sup> For instance, the initial applications of the IHR to the coronavirus outbreak concluded that there was no scientific evidence for the efficiency of travel restrictions, and that such restrictions, therefore, violated the dignity, human rights and fundamental freedoms of persons.<sup>144</sup> This conclusion was an

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Schwab trans., 2005) (describing liberalism as negotiation and “a cautious halfmeasure”).

<sup>142</sup> The principle of proportionality requires that a limitation of a right be appropriate and necessary. See Garde, *supra* note 93, at 242 (discussing the principle of proportionality). See also SIRACUSA PRINCIPLES, *supra* note 3, at art. I, § A, ¶ 10 (defining “necessity” as proportionality).

<sup>143</sup> See Mo, *supra* note 11 (stating that many capitalist governments’ response to the pandemic was slow and full of loopholes and arguing that China’s performance in combating coronavirus illustrated the advantages of its socialist system).

<sup>144</sup> Roojin Habibi et al., *Do Not Violate the International Health Regulations During the COVID-19 Outbreak*, 395 LANCET 664 (2020), [https://doi.org/10.1016/S0140-6736\(20\)30373-1](https://doi.org/10.1016/S0140-6736(20)30373-1) [<https://perma.cc/F3EJ-F876>] (arguing that the travel restrictions against China (i) were not supported by scientific evidence; (ii) did not constitute the least restrictive means; (iii) could not be adopted as a precaution under IHR; and (iv) consequently failed to restrict the dignity, human rights and fundamental freedoms of persons). For earlier research on travel restrictions, see Ana L.P. Mateus et al., *Effectiveness of Travel Restrictions in the Rapid Containment of Human Influenza: A Systematic Review*, 92 BULL. W.H.O. 868 (2014) (asserting that travel restrictions can delay but cannot prevent the dissemination of influenza). Rights-based views were published in Chinese media at the beginning of the outbreak. See Wang Xigen (汪习根), “Yiqing Qishi” shi dui Renquan de Wuqing Tiaozhan (“疫情歧视”是对人权的无情挑战) [“Epidemic Discrimination” is a Relentless Challenge to Human Rights], PEOPLE’S DAILY (Feb. 18, 2020), [http://paper.people.com.cn/rmrb/html/2020-02/18/nw.D110000renmrb\\_20200218\\_1-11.htm](http://paper.people.com.cn/rmrb/html/2020-02/18/nw.D110000renmrb_20200218_1-11.htm) [<https://perma.cc/D32Y-VJD2>] (arguing against discrimination arising out of the pandemic). See also Richard Pérez-Peña, *Virus Hits Europe Harder Than China. Is That the Price of an Open Society?*, N.Y. TIMES (Mar. 19, 2020), <https://www.nytimes.com/2020/03/19/world/europe/europe-china-coronavirus.html?referringSource=articleShare> [<https://perma.cc/T6ZL-JABH>] (arguing that the virus has hit Europe harder because “governments aren’t used to giving harsh orders, and citizens aren’t used to following them”).

authentic application of the IHR at the time (although not the only possible interpretation),<sup>145</sup> but from a critical perspective it also demonstrated the inefficiency of rights-based processes. A promoter of illiberal narratives and of Chinese-style Marxism, in particular, may contrast liberal rights-based approaches (unfavorably) with the mobilization of masses in the Chinese “people’s war” against the pandemic.<sup>146</sup>

Another classic theme in illiberal political thought accuses liberalism of hypocrisy. Liberal principles, according to this criticism, provide an ideological mask for a regime that is in certain foundational ways as repressive as illiberal regimes.<sup>147</sup> In an emergency, the classic illiberal argument runs, liberal indecisiveness either proves fatal (potentially causing the liberal regime to be replaced by an illiberal political order) or it is discarded in favor of measures that are not based on liberal first principles in any meaningful way.<sup>148</sup> A critic may point out that in the present

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<sup>145</sup> The IHR requires, *inter alia*, that health measures be based on scientific principles and available scientific evidence. If scientific evidence is insufficient, the health measures must be based on “available information including from WHO and other relevant intergovernmental organizations and international bodies.” See WORLD HEALTH ORGANIZATION [WHO], *International Health Regulations*, art. 43, ¶ 2 (3rd ed. 2015). IHR also provides that the “implementation of these Regulations shall be with full respect for the dignity, human rights and fundamental freedoms of persons.” See *id.* at art. 3, ¶ 1. In retrospect it can be said that the available scientific evidence at the beginning of the pandemic was insufficient and that the restrictions were, therefore, allowed under IHR. In the beginning of the pandemic, however, scholars were operating on evidence from previous epidemics. See generally Habibi et al., *supra* note 144.

<sup>146</sup> See Wang Hui (汪晖), *Jintian, Weisheme Yao Jinian Liening? Xie zai Liening Danchen 150 Zhounian zhi ji* (今天, 为什么要纪念列宁? 写在列宁诞辰150周年之际) [*Why Should We Commemorate Lenin Today? Written on Lenin’s 150<sup>th</sup> Anniversary*], WENHUA ZONGSHEN (文化纵横) (Apr. 22, 2020), <https://mp.weixin.qq.com/s/5WdKGSbmGeD5Q3D1bCEfOw> (discussing China’s coronavirus response as an instance of China’s people-centered socialism).

<sup>147</sup> See KARL MARX & FRIEDRICH ENGELS, MANIFESTO OF THE COMMUNIST PARTY, reprinted in THE MARX-ENGELS READER 469, 487 (Robert Tucker ed., 2d ed., 1978). See also SCHMITT, THE CONCEPT OF THE POLITICAL, *supra* note 10, at 79 (arguing that even an apparently nonpolitical system serves friend-and-enemy groupings); SCHMITT, POLITICAL THEOLOGY, *supra* note 141, at 66 (arguing that every government is necessarily absolute).

<sup>148</sup> CORTÉS, *supra* note 10, at 174–175.

pandemic, governments in liberal democracies have taken up measures that are similar or identical to those first adopted by the Chinese government. Following China's example, for instance, the Italian government placed individual provinces, and finally the entire country, under a police-enforced lockdown.<sup>149</sup> The assumption that such measures were legitimate because their subjects agreed to them, or could have agreed to them, through a democratic process appears disingenuous to a critic. When individuals contest coercive measures in a court of law or elsewhere, they demonstrate their disagreement with these measures, even though the same individuals agreed to, or could have agreed to, these measures in a democratic process. For a critic, the role of the liberal narratives is, therefore, to add ideological gloss to any action that a liberal democratic government takes (or does not take).

To be sure, the measures adopted in Italy and in other liberal democracies were not as strict as those taken in China, and in particular, in Wuhan. In contrast to Wuhan, where residents were locked inside their apartments and monitored and supported by community workers, Italians were able to go out shopping and take care of other urgent needs.<sup>150</sup> While the Italian measures were more lenient, a critic may point out that they were also less efficient than the Chinese ones.<sup>151</sup> Lenient lockdown measures in the United States and the United Kingdom also had worse results (in terms of casualties)

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<sup>149</sup> Marzia Lazzarini & Giovanni Putoto, *COVID-19 in Italy: Momentous Decisions and Many Uncertainties*, 8 LANCET 641 (2020), [https://www.thelancet.com/journals/langlo/article/PIIS2214-109X\(20\)30110-8/fulltext](https://www.thelancet.com/journals/langlo/article/PIIS2214-109X(20)30110-8/fulltext) [<https://perma.cc/U97B-3AFB>]; Andrea Remuzzi & Giuseppe Remuzzi, *COVID-19 and Italy: What Next?*, LANCET (2020), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30627-9/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30627-9/fulltext) [<https://perma.cc/4M4C-RGNR>].

<sup>150</sup> Lazzarini & Putoto, *supra* note 149. See also *Coronavirus: How are lockdowns and other measures being enforced?*, B.B.C. (Mar. 17, 2020), <https://www.bbc.com/news/world-51911340> [<https://perma.cc/B9HH-SVTE>] (reporting on the strict lockdown implemented in Wuhan, which included “guards at entrances to resident buildings to keep people inside”).

<sup>151</sup> See *Coronavirus disease 2019 (COVID-19) Situation Report—80*, WORLD HEALTH ORGANIZATION [WHO] (Apr. 9, 2020), [https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200409-sitrep-80-covid-19.pdf?sfvrsn=1b685d64\\_6](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200409-sitrep-80-covid-19.pdf?sfvrsn=1b685d64_6) [<https://perma.cc/Q6WN-3PX8>] (displaying reports on the coronavirus pandemic situation from countries around the world).

compared to the Chinese methods.<sup>152</sup> From the illiberal perspective, the Chinese government's coronavirus response may have appeared excessively repressive to liberal sensibilities, but it protected Chinese citizens from the disease more effectively than the measures adopted in liberal democratic regimes.<sup>153</sup> A promoter of illiberal narratives may, consequently, conclude that liberal governments were willing to accept more casualties in the pandemic than the P.R.C. government.<sup>154</sup>

The liberal response to such critiques may reassert the inherent value of the liberal first principles and the institutions that are justified on those bases. As imperfect and aspirational as liberal democratic institutions may be, allowing government agencies or Communist Party cadres to impose public health measures without democratic and judicial oversight would be a far worse arrangement. Since liberal first principles are protected by legal rights, it is the judiciary—rather than, say, the CCP's discipline inspection organs—that is best placed to determine the extent of these rights.<sup>155</sup> The present pandemic is no reason to give up the rights-based approach

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<sup>152</sup> See *Coronavirus Disease 2019 (COVID-19) Situation Report 60*, WORLD HEALTH ORGANIZATION [WHO] (Mar. 19, 2020), [https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200320-sitrep-60-covid-19.pdf?sfvrsn=d2bb4f1f\\_2](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200320-sitrep-60-covid-19.pdf?sfvrsn=d2bb4f1f_2) [<https://perma.cc/UQH6-PWAE>] (displaying reports on the coronavirus pandemic situation from countries around the world).

<sup>153</sup> See WHO, *supra* note 7, at 16–18 (describing China's public health measures against coronavirus outbreak as “ambitious, agile and aggressive,” as well as “bold” and “science-based”); *Editorial: COVID-19: Too Little, Too Late?*, 395 LANCET 755 (2020), <https://www.thelancet.com/action/showPdf?pii=S0140-6736%2820%2930522-5> [<https://perma.cc/2KBK-FNGX>] (stating that “the colossal public health efforts of the Chinese Government have saved thousands of lives”); *Editorial: Emerging Understandings of 2019-nCoV*, 395 LANCET 311 (2020), <https://www.thelancet.com/action/showPdf?pii=S0140-6736%2820%2930186-0> [<https://perma.cc/7BG6-CFXS>] (stating that “Chinese authorities are meeting international standards”).

<sup>154</sup> See Schneider, *supra* note 14 (predicting that America will become the world's most infected country, despite its confidence in its own system). Although not making this claim explicitly, the P.R.C. State Council's white paper on the coronavirus pandemic emphasizes that the Chinese government prioritized people's lives instead of economic interests in its response. P.R.C. STATE COUNCIL, *supra* note 12.

<sup>155</sup> See Alicia Ely Yamin, *Promoting Equity in Health: What Role for Courts?*, 16 HEALTH & HUM. RTS J. 1, (2014) (noting the critical role of litigation for basic human dignity and non-discrimination in health care).

to health, let alone the liberal democratic governance model, even though some rights may need to be momentarily restricted and even though public health outcomes in liberal democracies may be worse by some measures than those in the P.R.C.<sup>156</sup> Such setbacks are not the ultimate test for the legitimacy of liberal democracies. In any event, the coronavirus pandemic is not an existential crisis or a war-like event for liberal democracies, as it tellingly is for the P.R.C. according to the Chinese government's own white paper on its coronavirus response.<sup>157</sup>

In this context, a promoter of the liberal approaches may concede that the above-described claims of the human rights-based approach are analytically unhelpful.<sup>158</sup> Perhaps it is analytically clearer to frame human rights conceptions as checks and balances on public health measures, rather than to assume that human rights and public health measures are inherently interrelated and mutually enforcing. Human rights protections may sometimes lead to worse public health outcomes than uninhibited government action. Nevertheless, the argument remains that this is an acceptable outcome for organizing society through the liberal first principles.

From the liberal perspective—and indeed from any perspective that is critical of illiberal narratives on political power—the coronavirus pandemic also reveals the inherent fragility of illiberal political systems.<sup>159</sup> As described above, a central justification for illiberal regimes is their ability to provide results-based political leadership, which transcends liberal law-based governance. Unbridled by legal and participatory processes, the

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<sup>156</sup> See Babones, *supra* note 5 (demonstrating how those with a liberal perspective may find the approach from China to be unappealing despite the outcomes that can result from such measures being put in place).

<sup>157</sup> See P.R.C. STATE COUNCIL, *supra* note 12 (describing the pandemic as a “great war”) and *infra* text accompanying note 164.

<sup>158</sup> See *supra* text accompanying notes 61–65 (regarding the interrelatedness of public health measures and human rights promoted by the human rights-based approach) and 93–95 (regarding the critique of the interrelatedness of public health measures and human rights).

<sup>159</sup> See, e.g., *Editorial: Virus Exposes China's Achilles' Heel*, *TAIPEI TIMES* (Feb. 7, 2020), <https://www.taipetimes.com/News/editorials/archives/2020/02/07/2003730505> [<https://perma.cc/PR8T-W297>]; Kavanagh, *supra* note 1, at 136; Pei, *supra* note 1 (discussing examples of fragility in the illiberal political systems from the liberal perspective).

Chinese party-state can build hospitals in a matter of days.<sup>160</sup> Nevertheless, when such direct action fails to yield positive results, or when it appears that the illiberal government model itself has adverse consequences for people's wellbeing—as many in China thought was the case in the first few months of the coronavirus outbreak—illiberal leaders cannot fall back on arguments about liberal first principles to legitimize their power. Indeed, a critic may point out that the repression of civil and political rights has stifled many parts of the Chinese society, built up dissent, and prevented grassroots information from reaching central authorities.<sup>161</sup> Judging by the postings on Chinese social media in the early stages of the pandemic in January and February 2020, many Chinese citizens did not see the initial cover-up of the coronavirus outbreak as a glitch or an anomaly of China's one-Party system, but as its predictable outcome.<sup>162</sup> The public criticism abated as the government's response proved effective against the virus.<sup>163</sup> Yet the Chinese

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<sup>160</sup> See Liu, *supra* note 105 (explaining how the Chinese socialist system allows the government to concentrate on accomplishing major tasks such as building hospitals in a short amount of time).

<sup>161</sup> See Liu et al., *Antagonists exploit Dr Li's death to slander China*, GLOB. TIMES (Feb. 8, 2020), <https://www.globaltimes.cn/content/1178876.shtml> [<https://perma.cc/6JLH-Y84W>] (detailing the Chinese government's efforts to control public discourse during the pandemic). For stability maintenance in China, see XUEZHI GUO, CHINA'S SECURITY STATE: PHILOSOPHY, EVOLUTION, AND POLITICS 418–419 (2012). For an assessment of China's social and political conditions today, see CARL MINZNER, END OF AN ERA: HOW CHINA'S AUTHORITARIAN REVIVAL IS UNDERMINING ITS RISE (2018); Cf. Eric Li, *Xi Jinping Is a 'Good Emperor'*, FOREIGN POL'Y (May 14, 2020), <https://foreignpolicy.com/2020/05/14/xi-jinping-good-emperor-coronavirus/> [<https://perma.cc/7U5M-CRJZ>] (describing how the pandemic has increased some people's trust in the Communist Party).

<sup>162</sup> Li Yuan, *Coronavirus Weakens China's Powerful Propaganda Machine*, N.Y. TIMES (Feb. 26, 2020), <https://www.nytimes.com/2020/02/26/business/china-coronavirus-propaganda.html> [<https://perma.cc/UM3C-LSMK>] (discussing the initial public criticism in China against the Chinese government's coronavirus response); Pei, *supra* note 1.

<sup>163</sup> For surveys on coronavirus-related citizen satisfaction in China, see THE WORLD IN CRISIS: A GLOBAL PUBLIC OPINION SURVEY ACROSS 23 COUNTRIES (SUMMARY REPORT) (TOLUNA & BLACKBOX 2020), [https://issuu.com/blackbox4/docs/world\\_in\\_crisis\\_final\\_report?fr=sZTM1ODEyNzA0Nzc](https://issuu.com/blackbox4/docs/world_in_crisis_final_report?fr=sZTM1ODEyNzA0Nzc) [<https://perma.cc/627C-HXWS>]; Cary Wu, *How Chinese Citizens View Their Government's Coronavirus Response*, THE CONVERSATION (Jun. 5, 2020), <https://theconversation.com/how-chinese-citizens-view-their-governments->

government itself has recognized that the pandemic was “a major test” for the Chinese party-state, and that its outcome was not a preordained matter.<sup>164</sup> In the next emergency, the government’s efforts may not turn out to be as effective.

For a critic, the precariousness of illiberal regimes is highlighted and exacerbated by Chinese political leaders’ conflicting approach to formal legal processes. As pointed out above, Chinese leaders simultaneously call for the strict implementation of the rule of law principle in the management of the coronavirus pandemic, while they also fight against formalism and bureaucratism.<sup>165</sup> In the Party ideologues’ mind, the two objectives belong to a coherent governance ideology.<sup>166</sup> The rule of law stands for the dutiful (but not too dutiful) observance of national laws and Party regulations, whereas bureaucratism and formalism are reflected by inefficient action and work practices. There are problems in this system—such as the bureaucratic reporting practices of epidemic outbreaks—but they can be ironed out through legal and institutional reforms.<sup>167</sup> Chinese legal scholars have, for instance, called for legal reforms, which would allow disclosure of necessary information, while suppressing undesired, socially harmful speech.<sup>168</sup> Such reform calls

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coronavirus-response-139176 [<https://perma.cc/CD6T-PUPS>] (pointing towards public satisfaction with the handling of the coronavirus pandemic in China).

<sup>164</sup> P.R.C. STATE COUNCIL, *supra* note 12.

<sup>165</sup> See *supra* text accompanying notes 127–133.

<sup>166</sup> For a statement about the role of formal law in fighting formalism, see Xia Chuntao (夏春涛), *Tuijin Yifa Zhiguo Zhongzai Jianchi Dang de Lingdao* (推进依法治国重在坚持党的领导) [*Promoting Ruling the Country According to Law and Upholding Party Leadership*], CPC NEWS (Nov. 26, 2014) <http://theory.people.com.cn/n/2014/1126/c40531-26098237.html> [<https://perma.cc/8LCB-GQLJ>].

<sup>167</sup> Wang, *Apply “Crisis Rule of Law” to Coronavirus Epidemic Prevention and Control*, *supra* note 130.

<sup>168</sup> See Hu Jinguang (胡锦涛), *Yifa Fangyi Neng Baozheng Zhengfu Gongxinli* (依法防疫能保证政府公信力) [*Preventing the Epidemic in Accordance with Law Can Ensure Governmental Credibility*], AI SIXIANG (May 3, 2020), <http://www.aisixiang.com/data/121147.html> [<https://perma.cc/R49J-MEXZ>] (discussing legal reforms such as providing sufficient legal justification for public health measures). For reform calls, see also Wang, *Apply “Crisis Rule of Law” to Coronavirus Epidemic Prevention and Control*, *supra* note 130 (discussing reforms to improve disclosure of information during pandemics).



rest on the notion that it is possible to make the Chinese party-state predictably governed and transparent.

From a critical perspective, however, it appears that such reform attempts clash with the basic tenets of the Party's governance project. During the present pandemic, Party leaders have made use of laws and regulations to rein in local Party cadres, who violate the commands of the central leadership.<sup>169</sup> Yet the same laws and regulations can also be used to criticize the central government's commands.<sup>170</sup> As long as Party leaders emphasize ideological conformity, disclosing inconvenient facts about the reality risks running afoul of the officially sanctioned versions of that reality. A critic may wonder whether Party leaders truly are willing to create a culture of formalism within the state and Party organs, which would allow the airing of important concerns about Chinese society. Such a culture could eventually be used to hold Party leaders accountable for their actions.<sup>171</sup> Indeed, it appears that no matter how Chinese disease control and prevention laws are formulated, China's one-party system will end up providing Party cadres extralegal powers to trump inconvenient interpretations of legal norms—and attempts to disclose information about, say, future public health threats.

To be sure, the above-described arguments are not fatal for any ideological project. Facing criticism, defenders of liberal and illiberal ideological narratives may simply restate their core articles of faith and hope that, in the final analysis, it is their ideological position that most credibly accounts for the unfolding events. Depending on one's perspective, the high human and economic costs of the pandemic in liberal democracies can attest to the inefficiency and relative disregard for human life and dignity in liberal regimes—or to the robustness of liberal democracies, which can afford to address public health emergencies in a less than efficient manner

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<sup>169</sup> See XINHUA, *Xi Stresses Law-based Infection Prevention*, *supra* note 15 (describing Xi's instructions to Party committees and governments at all levels to improve law-based governance).

<sup>170</sup> See *supra* text accompanying notes 136–138 (listing criticisms from liberal-minded academics and lawyers towards coercive public health measures).

<sup>171</sup> For such opportunities, see Liu Songshan (刘松山), *Dang de Lingdao Xieru 1982 nian Xianfa de Lishi Huigu yu Xin Qidai* (党的领导写入1982年宪法的历史回顾与新期待) [*A Historical Review and New Expectation On the Party's Leadership in the 1982 Constitution*], HENAN CAIJING ZHENGFA DAXUE XUEBAO (河南财经政法大学学报), no. 3, 2014, at 1, 18.

without jeopardizing their very existence. Conversely, the P.R.C. government's ability to respond to public health emergencies is either compromised by the ills of illiberalism—or aided by the regime's ability to suspend rights and legal processes for the greater good. Promoters of both narratives can also rely on counterfactual arguments. The pandemic would have unfolded in a less damaging manner, if liberal democratic governments had adhered to the rights-based approach more closely—or if the P.R.C. government had been more centralized and less formalist and bureaucratic. The role of ideological narratives is to help people make such leaps of faith.

## VII. CONCLUSION

This Article has provided a tentative sketch of liberal and illiberal ideological narratives on the coronavirus pandemic. To a large extent, these narratives highlight the idiosyncratic aspects and, more critically, endemic weaknesses, of the opposing ideological outlook. From the illiberal perspective, promoters of liberal narratives on governance and public health can be said to focus too much on procedural legitimacy and, consequently, they appear to be ill-placed to acknowledge and respond to public health emergencies. From the liberal perspective, advocates of illiberal narratives appear to be responding to a never-ending emergency situation and, consequently, they seem unable to take full advantage of procedural legitimacy and rule-based governance in order to prevent public health emergencies from occurring. The unsettled nature of these ideological arguments and the anomalies they bring out also puts into question the basic assumptions of both narratives. On the one hand, it seems aspirational—or outright fictitious—to argue that the coronavirus response in liberal democracies is based on respect for individual freedom, human dignity and other liberal first principles. On the other hand, the image of a strong stable government projected by the CCP seems to be based on aspirational notions about the coherence and resilience of the Party's governance project. In the middle of the coronavirus pandemic, it appears that the coronavirus follows no ideological script.